

APPENDIX

Supreme Court of the United States

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APPENDIX

Supreme Court of the United States

October Term, 1971

No. 71-1134

HARRY ROADEN - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

CHRONOLOGICAL LIST OF PROCEEDINGS BELOW

- 9-29-70 Petitioner arrested and film seized by Sheriff of Pulaski County, Kentucky.
- 9-30-70 Indictment returned.
- 10- 3-70 Petitioner entered a plea of not guilty.
Case set for trial on October 20, 1970.
- 10-12-70 Petitioner filed motion to suppress evidence and dismiss indictment.
- 10-16-70 Hearing held on Petitioner's motion to suppress evidence and dismiss indictment.
- 10-20-70 Petitioner's Motion to suppress evidence and dismiss indictment overruled by Judge Hail.
Trial, Pulaski Circuit Court, Lawrence S. Hail, Judge.
Order adjourning court until October 21, 1970.
- 10-21-70 Trial concluded, Pulaski Circuit Court, Lawrence S. Hail, Judge.
Verdict returned in open court, reading as follows: "This jury finds the motion picture Cindy and Donna obscene." /s/ Paul Elliott, Foreman
"We the jury finds the defendant Harry Roaden guilty as charged set his punishment \$1,000 fine

and six months in jail. /s/ Paul Elliott, Foreman."

Judgment of Pulaski Circuit Court.

- 10-27-70 Petitioner filed Notice of Appeal to Kentucky Court of Appeals.
- 12-18-70 Petitioner filed Statement of Appeal, \$25.00 filing fee, 1 volume transcript of record and 1 volume transcript of evidence and Motion for Appeal and Notice.
- 1-26-71 Petitioner filed brief with the Kentucky Court of Appeals.
- 4-15-71 Commonwealth of Kentucky filed brief with the Kentucky Court of Appeals.
- 4-16-71 Case submitted.
- 6-25-71 Opinion of Court of Appeals of Kentucky by Commissioner Davis affirmed Judgment of the Pulaski Circuit Court.
- 8-18-71 Petitioner filed Petition for Rehearing with the Kentucky Court of Appeals.
- 10- 7-71 Commonwealth of Kentucky filed Response to Petition for Rehearing.
- 12-17-71 Rehearing denied by Kentucky Court of Appeals. Mandate Issued.
- 12-28-71 Petitioner filed Motion To Stay Execution and Enforcement of Mandate (affidavit attached).
- 1-14-72 Motion To Stay Execution and Enforcement of Mandate sustained for a period of 90 days from January 14, 1972.
- 4- 3-72 Petitioner filed Motion For Extension of Stay of Execution and Enforcement of Mandate (affidavit attached).
- 4-18-72 Extension of Stay of Execution and Enforcement of Mandate granted for a period to and including May 18, 1972.

5-10-72 Petitioner filed Motion for Additional Extension of Stay of Execution and Enforcement of Mandate (affidavit attached).

INDICTMENT

PULASKI CIRCUIT COURT

(R. 3, 4)¹

COMMONWEALTH OF KENTUCKY - - Respondent

v. Indictment No. 4432
KRS Sec. 436.101

HARRY ROADEN - - Defendant

The grand jury charges:

On or about the 29th day of September 1970 In Pulaski County, Kentucky, the above named defendant did unlawfully and wilfully publish and exhibit, or had in his possession with intent to publish and exhibit, an obscene motion picture entitled "Cindy and Donna".

Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky.

A True Bill

/s/ John T. Kelley

Foreman.

Harold Rogers
Commonwealth's Attorney
28th Judicial District
of Kentucky

¹"R" refers to Clerk's Transcript of Record. "T" refers to Reporter's Transcript of Evidence.

On the back of said indictment appears the following:

#4432

The Commonwealth of Kentucky

Indictment for
Showing Obscene
Motion Pictures

v.

Harry Roaden

Address

A True Bill

Name	Witnesses Address	Phone
Gilmore Phelps	County Sheriff	
James Strunk	Deputy Sheriff	
John Henry Johnson	Deputy Sheriff	

Presented by the foreman of the Grand Jury to the Court in the Presence of the Grand Jury and received by me from the Court and filed in open Court on the 30th day of September 1970

Bail \$500 Summons

/s/ Delvin Holt
Pulaski Circuit Court Clerk

PULASKI CIRCUIT COURT

ORDER RECITING PLEA AND SETTING TRIAL DATE

(R. 5)

Pulaski Circuit Court
 Regular September Term
 24th day of the term
 October 3, 1970

COMMONWEALTH OF KENTUCKY - - - - - Plaintiff

v. ORDER #4432 Showing Obscene Picture

HARRY ROADEN - - - - - Defendant

.

The defendant this day appeared in open court represented by Hon. M. D. Harris, He waived arraignment and entered a plea of not guilty to above charge. The court set his case for trial on October 20, 1970.

/s/ Lawrence S. Hail, Judge
 Pulaski Circuit Court.

PULASKI CIRCUIT COURT
PETITIONER'S MOTION TO SUPPRESS EVIDENCE
AND DISMISS INDICTMENT

(R. 6, 7, 8)

Pulaski Circuit Court
 Regular October Term
 1st day of the Term
 October 12, 1970

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

v. **MOTION TO SUPPRESS EVIDENCE**
AND DISMISS INDICTMENT #4432

HARRY ROADEN - - - - - *Defendant*

This day came counsel for defendant and produced and filed Motion to suppress evidence and dismiss indictment herein, which is now noted of record.

/s/ Lawrence S. Hail, Judge
 Pulaski Circuit Court.

The Motion to Suppress Evidence and Dismiss Indictment as referred to in the last Order is in words and figures as follows, to-wit:

PULASKI CIRCUIT COURT
 COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

v. **MOTION TO SUPPRESS EVIDENCE**
AND DISMISS INDICTMENT #4432

HARRY ROADEN - - - - - *Defendant*

Comes now the defendant by counsel, and moves the Court to suppress the evidence and dismiss indictment No. 4432 returned thereon on the following grounds:

1. That the evidence was improperly, unlawfully and illegally seized, contrary to the procedure provided by Statute and the laws of the land.

2. That without the improperly, unlawfully and illegally seized evidence an indictment would not be returnable, and therefore, should be dismissed.

Harris & Wicker
120 North Main Street
Somerset, Kentucky
Attorneys for Defendant
By /s/ Phillip K. Wicker

NOTICE

TO: Hon. Harold Rogers
Commonwealth's Attorney
28th Judicial District
Somerset, Kentucky

Please take notice that the foregoing Motion to Suppress Evidence and Dismiss Indictment will be brought on for hearing before Hon. Lawrence S. Hail, Judge of the Pulaski Circuit Court, in the Court Room at Somerset, Kentucky, on Friday, October 16, 1970, at 2:00 P.M. or as soon thereafter as the business of the Court will permit. This 12th day of October, 1970.

/s/ Phillip K. Wicker
Counsel for Defendant

(Certificate of service omitted in printing)

PULASKI CIRCUIT COURT

TRANSCRIPT OF EVIDENCE IN COMMONWEALTH
OF KENTUCKY V. ROADEN, OCTOBER 20 AND
21, 1970

(T. 4)

Honorable P. K. Wicker: One thing I can anticipate by watching the trial the outcome of the ruling on the motion to suppress.

The Court: Let it be overruled, unless you want to have something to say.

Honorable P. K. Wicker: I don't know of anything else to add, certainly we can't add anything we didn't bring up Friday.

Honorable M. D. Harris: To what we did say.

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The Court: Overruled.

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(T. 20)

The first witness called by counsel for the Commonwealth SHERIFF GILMORE PHELPS being first duly sworn, in response to questions propounded to him by the Attorneys, both for the Commonwealth and the defendant, stated as follows, to-wit:

Direct Examination by Mr. Rogers

Q. 1. State your name, please?

A. Gilmore Phelps.

Q. 2. What is your occupation?

A. Sheriff of Pulaski County.

Q. 3. How long have you served as Sheriff of Pulaski County?

A. Since January 4th '70, this year.

Q. 4. Have you served previously as Sheriff of this county?

A. Yes, sir.

Q. 5. When did you serve?

A. I have served two terms previously.

Q. 6. What is the length of the terms that you have served?

A. Four years, four years each.

Q. 7. So you are going on your ninth or tenth year as Sheriff?

A. Yes, sir.

Q. 8. Sheriff, are you the chief law enforcement officer of Pulaski County, Kentucky?

A. Yes, sir.

Q. 9. Directing your attention to the date of September 29th 1970 did you have occasion at that time to view a motion picture in this county?

A. Yes, sir.

Q. 10. Where and when did you view the movie?

A. At Highway 27 Drive-In on South 27.

Q. 11. Do you know what time it was?

(T. 21)

A. The time of it?

Q. 12. The time of day?

A. It was at night.

Q. 13. That is a drive-in theatre I believe you said?

A. Yes, sir.

Q. 14. Would you briefly describe the lay-out of a drive-in theatre or this drive-in theatre?

A. Well, of course, it has to show of a night due to the light on the screen, of course, the voices are carried through speakers to each vehicle, you sit in your car and watch the movie from your automobile.

Q. 15. Did you view the entire movie that night?

A. Yes, sir.

Q. 16. What was the name of the movie?

A. Donna and Cindy.

Q. 17. Was it Cindy and Donna or Donna and Cindy?

A. Cindy and Donna.

Q. 18. Were there people other than yourself there that night?

A. Yes, sir.

Q. 19. Could you tell who they were?

A. Well, they was several people there, no, sir, I couldn't.

Q. 20. Were they members of the general public so far as you knew?

A. Yes, I would say so.

Q. 21. How did you gain access to the theatre?

A. Through the main entrance, through the gate.

Q. 22. Did you go in without paying?

A. No, sir, I paid.

Q. 23. You paid the admission price?

A. Yes, sir.

Q. 24. Was this in Pulaski County, Kentucky?

A. Yes, sir.

(T. 22)

Q. 25. What did you do, if anything, after viewing the moving picture Cindy and Donna?

A. We, I'll say we arrested, I did, Mr. Roaden and seized the film.

Q. 26. Are you indicating the defendant Harry Roaden?

A. Yes, sir, the one here with Mr. Harris and Mr. Wicker.

Q. 27. Where was he at the time?

A. In the projection room where the film was shown from.

Q. 28. What was he doing, if anything, at the time you arrested him?

A. He had shown the film at the conclusion of it, why—

Q. 29. Was he the operator of the machine at the time?

A. Yes, sir.

Q. 30. Do you know who operates the Drive-In theatre itself?

A. Mr. Roaden.

Q. 31. What did you charge the defendant with at that time Mr. Sheriff?

A. The showing of an obscene movie to the general public.

Q. 32. Did you later appear within twelve months before the Pulaski County Grand Jury in the securing of this indictment?

A. Yes, sir.

Q. 33. Would you briefly describe to the Court and Jury the general nature of what the motion picture showed on the screen there at the Drive-In Theatre that night?

A. Well, the title of it was Cindy and Donna which is two female names, and—

Honorable M. D. Harris: Your Honor, I object to this defendant describing it because the film itself is the best evidence, Mr. Phelps, of necessity would only be giving his impression or opinion, and not finding facts—

(T. 23)

The Court: Well, I presume the film is going to be introduced in evidence.

Honorable Harold D. Rogers: Yes, sir.

The Court: I think, Mr. Harris, it would be permissible for the Sheriff to give a resume, so to speak, as to what the film was about, in order to identify the film, I don't think he should go into full details.

Honorable M. D. Harris: If, Your Honor, will forgive me but he could not possibly tell what the film was about, without picking out parts of the film that impressed him,

his opinion, after the jury sees the film, I don't see how the witness can answer the question without giving details as to parts of the film—

The Court: Well, I am going to permit him there as to state in substance what the film was about, without giving any, without going into details, but, as I say, I am going to permit him to tell what the film was about as a general proposition, but not to go into full details, because if the picture is exhibited to the jury, they can see the film themselves, but just for identifying, for the purpose of identifying the film that I presume will be introduced.

Q. 34. Now, subject, Sheriff, to the Court's limitations which you have heard, tell the Court and Jury about the film?

A. Well, this man and his wife, they had two daughters, one was a step-daughter, one of the daughters was hers and not his, and the step-daughter was a worldly type, older than his and her daughter, she was younger very much younger, and the picture bears out his

(T. 24)

relations with his stepdaughter—

Q. 35. Bears out his relations with who?

A. Her step father, the relations between he and her and then her trying to influence her half-sister I guess it would be in the acts of what her Father had showed her.

Honorable M. D. Harris: Show our objections to the Court's ruling and to the answer of the witness.

Q. 36. Sheriff, did the motion picture show the human anatomy uncovered to any degree?

A. Yes, sir.

Q. 37. To what degree did it show it?

A. Completely.

Q. 38. Did it show a male and female person or persons together in any intimate love scenes in the movie?

A. Yes, sir.

Q. 39. At the time you made the arrest of the defendant and took the motion picture, at that time as evidence, were you aware of the Kentucky statute against the showing of obscene motion pictures?

A. Yes, sir, I was.

Q. 40. Where is, excuse me, you say you took the film with you that night?

A. Yes, sir.

Q. 41. What did the film consist of?

A. It consisted of two canisters or cans, reels, with, I mean, cans, with one of them had three reels in it and one of them has two, what I mean by reels, the film is rolled on reels inside the canister, they're in two containers.

Q. 42. Where is the film now?

(T. 25)

A. Downstairs in my safe.

Q. 43. Have you had it in your possession and control since the night you took it from the drive-in theatre?

A. Yes, sir.

Q. 44. Is it in the same condition as it was then?

A. Yes, sir.

Q. 45. Has it been changed in any degree whatsoever?

A. No, sir.

Q. 46. With the court's permission would you go to your safe and bring the film to the courtroom?

A. Yes, sir.

Q. 47. May the witness be allowed to go, Your Honor?

The Court: Yes, sir.

• • • • •

Q. 48. Sheriff, after a short break you have retaken the stand in this case and you are still under oath you understand that?

A. Yes, sir.

Q. 49. Now, you have before you here what appears to be two metal canisters, can you identify what they are?

A. Containers of the film of Cindy and Donna.

Q. 50. Would you step out of the box around front and
(T. 26)
calling your attention to the larger of the two canisters, can
you identify what that particular container is or what it
contains?

A. Yes, sir.

Q. 51. What is it?

A. Cindy and Donna on the container and there is
my initials.

Q. 52. Now, does the container contain anything?

A. Yes, sir.

Q. 53. Would you open it up for us, please—

A. (Sheriff does as requested)

Q. 54. Now you have opened the larger of the two con-
tainers and there appears to be three reels of film inside,
can you identify those reels?

A. Yes, sir.

Q. 55. What are they?

A. The film of Cindy and Donna.

Q. 56. Is that the same thing that you got that night?

A. Yes, sir.

Q. 57. I believe you have earlier testified that these are
in the same condition as the night when you took them, is
that correct?

A. Yes, sir.

Q. 58. Will you introduce the three reels?

Honorable P. K. Wicker: Objection, Your Honor, on the
same grounds previously stated, we renew our motion to
suppress the films themselves, the Court being advised
overruled said objection.

Q. 59. Will you introduce Sheriff the three reels inside
the larger container as Exhibits 1, 2 and 3 as the reels

(T. 27)

are labeled, with the brown band around them, and the
canister as Exhibit "A"?

A. Yes, sir.

(Filed with Reporter and marked for identification as Commonwealth's Exhibits #1, 2 and 3 and "A".)

Q. 60. Now, will you proceed to the smaller canister and tell us what if anything is in it?

A. There's two reels, Cindy and Donna and here is my mark I put on it the night I seized them.

Q. 61. Now, will you open that canister, what's in the canister now, Sheriff?

A. Two réels marked 4 and 5 continuing of the film Cindy and Donna.

Q. 62. Are those reels in the same condition as they were at the time you took them?

A. Yes, sir.

Q. 63. And is the film on both canisters the same?

A. Yes, sir.

Q. 64. Will you introduce the two reels in the small canister as Exhibits 4 and 5 to your testimony and the canister as Exhibit "B" to your testimony?

A. Yes, sir.

Honorable P. K. Wicker: Objection on the grounds as stated before—

The Court: Overruled.

A. Yes, sir.

Q. 65. You may retake the stand, Sheriff, at the time you viewed the motion picture as you have earlier testified on September 29, 1970, did you make a determination as to whether or not the motion picture appealed to the prurient interest?

A. Yes, sir.

(T. 30)

Q. 67. Sheriff, are you able to show this film you have before you here to the jury?

A. Not in the courtroom here, I'm not.

Q. 68. Why can you not do that?

A. Because it is a commercial type film and it takes special 35 MM cameras to show it and it takes a regular movie screen to show it, and projector.

Q. 69. Subject to the Court's permission have you made such arrangements if the court allows it?

A. Yes, sir.

Q. 70. What arrangements have you made?

A. Arrangements have been made with a local theatre here in town to show it, providing the court permits it.

Q. 71. Now, what theatre are you referring to?

A. The Virginia.

Q. 72. You have rented that theatre, have you?

A. On the basis if the court permits.

Q. 73. But you are paying rent for that theatre to show it there if the court allows it?

A. Yes, sir.

Q. 74. Do you know who the projectionist will be?

A. Nothing only what they told me.

Q. 75. Who did they tell you?

A. Norma Leveridge.

Q. 76. Do you know of your own knowledge whether or not she is a qualified projectionist?

A. I'd say she was.

(T. 31)

Q. 77. You may ask him.

Cross-examination by Mr. Wicker

Q. 1. Sheriff, you say that was on the 29th day of September 1970, that you seized this film and made the arrest?

A. Yes, sir.

Q. 2. Did you see all the film prior to making the arrest and seizure?

A. Yes, sir.

Q. 3. Was there anyone with you?

A. Yes, sir.

Q. 4. Who was with you?

A. The Commonwealth's Attorney.

Q. 5. Mr. Rogers?

A. Yes, sir.

Q. 6. Was there anyone else with you?

A. No, sir.

Q. 7. Did you have any warrant when you made this arrest and seized this film?

A. No, sir.

Q. 8. Now, I believe you stated that following the showing of the film, you went to the projectionist booth and proceeded to arrest Mr. Roaden and seize the film, is that correct?

A. Yes, sir.

Q. 9. Do you know how long Mr. Roaden had been in the projection booth at the time you came in?

A. No, sir.

Q. 10. You had not seen him that night, prior to going in to the projection booth?

A. I didn't go up in the Projection room before.

(T. 32)

Q. 11. Mr. Phelps, had there been any prior determination before a magistrate or a Judge that this film was obscene?

A. Not to my knowledge.

Q. 12. At the time you seized this film and made this arrest, did you know what the definition of obscene was under the Kentucky statute?

A. I had read it, yes, sir.

Q. 13. What does it say?

A. KRS 436.101 Obscene means to the average person applying to a temporary standard predominant appeal of the matter taken as a whole is the prurient interest a shameful or morbid interest in nudity, sex or excretion which goes beyond customary limits and candor description or representation of such matter.

Q. 14. Did you have that with you when you made that arrest?

A. No, sir.

Q. 15. I note that you are using notes, are those your notes?

A. Yes, sir.

Q. 16. Did you copy that out of the Statute, or did someone copy that for you?

A. That's my writing.

Q. 17. Did Mr. Rogers give you the statute book and direct you to make a copy of it?

A. He gave me the number of it.

Q. 18. Did he ask you to do this—

A. No, sir.

Q. 19. Before the trial?

A. No, sir.

Q. 20. Now—

Honorable Harold Rogers: Your Honor, I am going to object to all of this, this is

(T. 33)

extraneous to the matter—

Honorable M. D. Harris: Your Honor, this is the most substantive thing that has come up in this trial yet—

Honorable Harold D. Rogers: I object to the statement of counsel—

The Court: Well, he gave his definition of it, and as to where he got it, he said it came out of the Statute, and so—
Sir?

Honorable M. D. Harris: We don't want to harass the Sheriff, he is a nice fellow, but we say at the time of that seizure that that information must have been within his knowledge—

A. I told you that—

The Court: That's what he testified to, overrule the objection, I mean, I sustain the objection as to any further questions.

Q. 21. Did you see any persons under eighteen years of age in the theatre that night?

A. I wouldn't say that I did, I didn't check their ages I mean I would say no, right off without checking.

Q. 22. I believe that's all.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. Did you make a search for who was there, Sheriff?

A. No, sir.

Q. 2. You didn't pay much attention?

A. No, sir, I did not.

Q. 3. Except that they were members of the general public?

A. Yes, sir.

Q. 4. Sheriff, at the time this picture was shown and the

(T. 34)

defendant was arrested, do you know who was the Manager or operator of the theatre itself?

A. Mr. Roaden.

Q. 5. That's all.

Recross-examination

Honorable P. K. Wicker

Q. 1. Is the the first time, Sheriff, to your knowledge there has been any inquiry as to whether a film was obscene in court?

Honorable Harold D. Rogers: That's immaterial to this case—

The Court: I believe that question was asked, was there an adversary hearing, you ask him in court was there an adversary hearing and

Honorable P. K. Wicker: We withdraw the question.

The Court: And he said he didn't know, I mean, not to his knowledge.

The next witness called by counsel for the Commonwealth JAMES STRUNK being first duly sworn, in response to questions propounded to him by the Attorney, stated as follows, to-wit:

Direct Examination by Mr. Rogers

Q. 1. State your name, please?

A. James Strunk.

Q. 2. What is your address?

A. Burnside.

Q. 3. What is your occupation?

(T. 35)

A. Deputy sheriff, Pulaski County.

Q. 4. Are you an employee or a deputy under Sheriff Gilmore Phelps?

A. Yes, sir.

Q. 5. How long have you served in that capacity?

A. Somewhere around four months.

Q. 6. I can't hear you—

A. Somewhere around four months.

Q. 7. I see, thank you, drawing your attention to September 28, 1970, did you at that time have occasion to view a moving picture in the county?

A. Yes, sir, I got a call on some, well, the Sheriff advised me to keep an eye on the movies down there both theatres.

Honorable M. D. Harris: I am going to object to that answer, that is not in response to the question—

The Court: That is not in response to the question.

Q. 8. Now just answer the question whether or not on September 28th, 1970 you had occasion to see a moving picture?

A. Yes, sir.

Q. 9. Where did you see a picture?

A. 27 Drive-In, 27th Highway Drive-In.

Q. 10. Now is that the Highway 27 Drive-In Theatre on South Highway 27?

A. Yes, sir.

Q. 11. Do you know the name of the motion picture?

A. Cindy and Donna.

Q. 12. Did you see all of the picture?

A. No, sir, I didn't.

Q. 13. About what amount of it did you see?

A. The amount that I seen was where the girls was loving—

(T. 36)

Q. 14. Well, now, don't tell what you saw, did you see a small amount of it or a substantial portion of it?

A. I'd say about thirty minutes of it.

Q. 15. And was this at night time?

A. Yes, sir.

Q. 16. Was there anyone there at that time besides yourself?

A. I wasn't in the drive-in, I was on the road outside of the drive-in right beside it.

Q. 17. Now was there anyone inside the drive-in viewing it?

A. Yes, sir, there was cars in there.

Q. 18. Do you know who they were?

A. No I don't.

Q. 19. As far as you know, were they members of the general public?

A. I would say so.

Q. 20. You may ask him.

Cross-examination

Honorable P. K. Wicker

No questions.

Honorable Harold D. Rogers: Judge, I would like the opportunity to recall this witness and Sheriff Phelps after

a motion picture is viewed if the Court allows the same for the purpose of making identification.

The Court: Let it be granted.

Honorable Harold D. Rogers: At this time, Your Honor, I would like to request the Court that the Stipulation be read by the Court Reporter.

(T. 37)

Court Reporter:

STIPULATION

It is stipulated by and between the parties by and through their respective counsel that Norma Leveridge is a qualified commercial projectionist of motion pictures, and that the projector at the Virginia Theatre at Somerset, Kentucky, will exhibit and show a 35 millimeter motion picture film in substantially or exactly the same method and manner as the projection equipment at the Highway 27 Drive-In Theatre near Somerset, Kentucky.

Honorable Harold D. Rogers: Your Honor, at this time, the Commonwealth moves the Court that the jury be allowed to go to the Virginia Theatre in Somerset, Kentucky, in custody of the Sheriff or deputy sheriff to view the motion picture that's been introduced in evidence, along with the court functionaries and the attorneys for the defendant.

Honorable M. D. Harris: Your Honor, before you make your ruling, counsel for the defense wants to object to the jury going to view this film with the sheriff or deputy sheriff who are witnesses in this prosecution who have viewed the film in the first place and are interested in the prosecution.

The Court: Let the Motion be sustained and the objection overruled.

Honorable Harold D. Rogers: Your Honor, I might point out that State Detective Sam King is in the Courtroom or the ante room adjoining the court room, perhaps

he might be able to be in charge of the jury if it is agreeable to the Court—

Honorable M. D. Harris: We respectfully request that some member of the Sheriff's

(T. 38)

staff who was not there and not involved in any way accompany the jury and also Detective Sam King—

Honorable Harold D. Rogers: Your Honor, the Detective, I mean, was not involved in any way.

The Court: I'll permit here Officer Strunk and Detective Sam King to accompany the jury and will request the Sheriff to keep the films in his custody at all times, even from the standpoint of when they are in the projection booth, the Sheriff will remain with the films at all times, in other words, from the time the films leave this courtroom until they are returned, they are not to be out of the presence of the Sheriff, they are to be in the custody of the Sheriff at all times.

The Court: Now, ladies and gentlemen of the jury, I must give you this admonition, I am going to permit you to go to the Virginia Theatre to view this film, you will be seated by the officers in the center aisle of the theatre, no one else will be in that center aisle, if the attorneys go, and the defendant and etc., they may sit on the side, on either side away from the jury, not to be connected with the jury, in any way, the officers will sit a row or two back behind the jury, that's so as to prevent anyone from making any statement and etc., and I am making this statement as to all present, there will be no demonstrations, there will be no words spoken, there will be no acts of any kind done by and between any of the attorneys, the officers or anyone there, and I am instructing the officers now that if anyone should violate that rule, let it be one of the attorneys over here or the Commonwealth's Attorney or whoever it may be, to arrest them immediately for contempt of court because the court is going to be very definite about that, no

(T. 39)

one is to contact the jury or to do anything to interfere with the viewing of the film by the jury.

Now Officer King and Strunk, hold up your hands, do each of you solemnly swear that you will be with this jury while they are in your custody, you will not permit anyone to talk with them about this case or any subject and that you will not do so yourself, that you will not permit anyone while they are in your care and custody to interfere with this jury in any way while you are going to the theatre where this film is being shown, that after it has been shown that you will then return with this jury back to this courtroom.

Now, ladies and gentlemen, what I would suggest, as you go, that one of the officers walk in front of the jury and one of the other officers walk behind the Jury.

We will now recess to go to the Virginia Theatre for the purpose of viewing this film.

Honorable M. D. Harris: Counsel for the defense requests that no other persons go than the court has designated, now that's the jury, Officer Strunk and Officer King, no other persons, counsel for defense will not be there, the defendant will not be there, and we request that no other persons go other than the members of the jury, Officer Strunk and Officer King.

The Court: The Court is going—

Honorable M. D. Harris: The Court is going, well, all right, that's the Court's prerogative.

The Court: I am taking the Court Reporter for the purpose of anything that should happen that should be reported.

Honorable M. D. Harris: That is your will, Your Honor.

(T. 40)

The Court: I would suggest that you and Mr. Wicker—

Honorable M. D. Harris: I will not be there, Judge—

The Court: I suggest further that the Commonwealth's Attorney—

Honorable Harold D. Rogers: I request to go, Your Honor.

The Court: And I suggest that a member of the Press—

Honorable M. D. Harris: We object to anybody of the Press going but if that the Court's ruling—

The Court: Because of the fact there that it is a picture that I mean a—it is a proceeding that should not be entirely behind closed doors.

Honorable M. D. Harris: It isn't the evidence—

Honorable Harold D. Rogers: This is a public trial. It's got to be public—

Honorable M. D. Harris: Comes counsel for the defense and excepts to the court's ruling in permitting officer Strunk, one of the witnesses for the Commonwealth, in accompanying the jury to the showing of the film and further excepts to the ruling of the Court in permitting members of the press to attend the viewing of the film, the Court being advised, overruled said exception to same counsel for defendants object and except. The objection to Officer Strunk on the same grounds as the objection to Officer Phelps, because he is an officer.

The Court:

(T. 41)

Ladies and gentlemen of the Jury, let me admonish you, this at the time we are going out to view the picture, remember not to talk about this case among yourselves, do not permit anyone to talk with you, do not form an opinion about it and do not express an opinion until the case is finally submitted to you for your consideration, while we are going to and from the theatre do not talk with anyone enroute, do not stop and talk with anyone enroute between here and the theatre, after you have seen the picture you will return in a body back to this courtroom and in

returning back to the courtroom you are not to stop and talk with anyone on the street and you are not to talk among yourselves about the picture, when you are returning back to the courtroom, you will only discuss it after the case is submitted to you for your consideration.

The Court: Officer King and Officer Strunk are sworn by the Court.

The Court on its own motion then questioned the officers as follows:

Q. 1. Officer King, you are one of the officers that the Court asked to go to the theatre with this jury, while they were in your custody?

A. Yes, sir.

Q. 2. Did you take them to the theatre?

A. Yes, sir.

Q. 3. And bring them back?

A. Yes, sir.

Q. 4. You are Officer Strunk?

A. Yes, sir.

Q. 5. You were in their company at all times?

A. Yes.

Q. 6. Did they converse with anyone during the time you went to the theatre?

(T. 42)

A. No, sir.

Q. 7. Officer Strunk, you are one of the Officers to take the jury to the theatre?

A. Yes, sir.

Q. 8. And brought them back?

A. Yes, sir.

Q. 9. During the time they were in your custody, did anyone converse with the jury, at any time from the time they left the courtroom until they returned?

A. No, sir.

Mr. Clerk, call the roll of the jury again, please.

Clerk Delvin Holt: Lewis Ledbetter, Neal Childers,

Lynn T. Minter, Carl Helton, Walter Clines, Mrs. Donald Pullen, Mrs. Ernest Brock, Augusta Latham, Eugene Tucker, Orville Alexander, Paul Elliott, Mrs. Henry Gilmore.

Q. 10. Were they all present?

Clerk Delvin Holt: Yes, sir.

The next witness recalled by counsel for the Commonwealth, SHERIFF GILMORE PHELPS, having been heretofore duly sworn, and having heretofore testified in behalf of the Commonwealth, stated as follows, to-wit:

The Court: You are Sheriff Phelps who earlier testified, you are still under oath?

Sheriff Gilmore Phelps: Yes, sir.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. Are you out of breath?

A. A little out of breath.

(T. 43)

Q. 2. Sheriff have you just been with the Court and Jury to the Virginia Theatre at a time when a motion picture Cindy and Donna was just shown?

A. Yes, sir.

Q. 3. Did you recognize the motion picture?

A. Yes, sir.

Q. 4. Is it the same movie you earlier testified you saw on the evening of September 29th, 1970 at the Highway 27 Drive-In Theatre on South Highway 27?

A. The same one.

Q. 5. You may ask him.

Re-Cross-examination

Honorable P. K. Wicker

Nothing, Your Honor.

The Court: Let the record show that on the court's own motion the following questions were asked the Sheriff.

Q. 1. Sheriff Phelps you took the films from this courtroom did you not, to the theatre?

A. Yes, sir.

Q. 2. Were they in your custody at all times, from the time you left the theatre until you returned here with them?

A. Yes, sir.

Q. 3. And you have them here with you now?

A. Yes, sir.

Q. 4. And they were in your custody at all times from the time you left the courtroom going to the Virginia Theatre to have them show to the jury until you brought them back?

A. Yes, sir.

Q. 5. O.K., that's all.

(T. 44)

The next witness recalled by counsel for Commonwealth JAMES STRUNK having been heretofore duly sworn and having previously testified in behalf of the Commonwealth, in response to questions propounded to him by the Attorneys, both for the Commonwealth and the Defendant, stated as follows, to-wit:

Honorable M. D. Harris: Comes counsel for the defense and objects to the Court interrogating the witness Gilmore Phelps and in effect prosecuting the case on behalf of the Commonwealth.

The Court: Let it be overruled.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. Your name is James Strunk and you are the person who earlier testified in this case?

A. Yes, sir.

Q. 2. Do you recognize, Mr. Strunk, that you are still under oath?

A. Yes, sir.

Q. 3. Did you accompany the jury to the Virginia Theatre to see a motion picture at that theatre, Mr. Strunk?

A. Yes, sir.

Q. 4. Did you recognize the motion picture that you saw there at the theatre?

A. Yes, sir.

Q. 5. Is it the same motion picture that you viewed on September 28, 1970?

A. Yes, sir.

Q. 6. At the Highway 27 Drive-In Theatre?

A. Yes, sir.

(T. 45)

Re-Cross-examination

Honorable P. K. Wicker

Q. 1. Did you buy a ticket when you went in the theatre on the 28th?

A. On the 28th I wasn't in the theatre.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. This is the time you saw it from the outside, Sheriff?

A. Yes, sir.

Honorable Harold D. Rogers: Your Honor, that's the case for the Commonwealth.

Commonwealth Closes in Chief

Honorable M. D. Harris: Your Honor, we reserved the right to make an opening statement.

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(T. 46)

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The Court: Let the record show that on the court's own motion the following questions were asked the Sheriff.

Q. 1. Sheriff Phelps you took the films from this courtroom did you not, to the theatre?

A. Yes, sir.

Q. 2. Were they in your custody at all times, from the time you left the theatre until you returned here with them?

A. Yes, sir.

Q. 3. And you have them here with you now?

A. Yes, sir.

Q. 4. And they were in your custody at all times from the time you left the courtroom going to the Virginia Theatre to have them show to the jury until you brought them back?

A. Yes, sir.

Q. 5. O.K., that's all.

(T. 44)

The next witness recalled by counsel for Commonwealth JAMES STRUNK having been heretofore duly sworn and having previously testified in behalf of the Commonwealth, in response to questions propounded to him by the Attorneys, both for the Commonwealth and the Defendant, stated as follows, to-wit:

Honorable M. D. Harris: Comes counsel for the defense and objects to the Court interrogating the witness Gilmore Phelps and in effect prosecuting the case on behalf of the Commonwealth.

The Court: Let it be overruled.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. Your name is James Strunk and you are the person who earlier testified in this case?

A. Yes, sir.

Q. 2. Do you recognize, Mr. Strunk, that you are still under oath?

A. Yes, sir.

Q. 3. Did you accompany the jury to the Virginia Theatre to see a motion picture at that theatre, Mr. Strunk?

A. Yes, sir.

Q. 4. Did you recognize the motion picture that you saw there at the theatre?

A. Yes, sir.

Q. 5. Is it the same motion picture that you viewed on September 28, 1970?

A. Yes, sir.

Q. 6. At the Highway 27 Drive-In Theatre?

A. Yes, sir.

(T. 45)

Re-Cross-examination

Honorable P. K. Wicker

Q. 1. Did you buy a ticket when you went in the theatre on the 28th?

A. On the 28th I wasn't in the theatre.

Re-Direct Examination

Honorable Harold D. Rogers

Q. 1. This is the time you saw it from the outside, Sheriff?

A. Yes, sir.

Honorable Harold D. Rogers: Your Honor, that's the case for the Commonwealth.

Commonwealth Closes in Chief

Honorable M. D. Harris: Your Honor, we reserved the right to make an opening statement.

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(T. 46)

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The first witness called by counsel for the Defense HARRY ROADEN, being first duly sworn, in response to questions propounded to him by the Attorneys, both for the Defense and the Commonwealth, stated as follows, to-wit:

Direct Examination by Mr. Wicker

Q. 1. State your name?

A. Harry Roaden.

Q. 2. How old are you?

A. Thirty six.

Q. 3. What is your occupation?

A. I am Manager of Highway 27 Drive-In Theatre.

Q. 4. Where do you live?

A. I live at 211 Ohio Street.

Q. 5. Is that in Somerset?

A. Yes.

Q. 6. Pulaski County?

A. Yes, sir.

(T. 47)

Q. 7. How long have you lived in this county?

A. Since 1953.

Q. 8. What has been your occupation during the time you have resided in this county?

A. I have been a theatre manager except for a short time when I was in service from 1953 until 1955.

Q. 9. On September 28, 1970 were you the manager of the Highway 27 Drive-In Theatre?

A. Yes.

Q. 10. Do you own the theatre?

A. No I don't own it.

Q. 11. Do you have anything to do with the pictures that are booked or played in the theatre?

A. No, I just play whatever comes in.

Q. 12. Do you have any control over that?

A. No.

Q. 13. Was there a picture called Cindy and Donna played at the theatre on September 28th of this year?

A. Yes, sir.

Q. 14. Was anyone under eighteen admitted?

Honorable Harold D. Rogers: Objection as being immaterial in this case, Your Honor.

The Court: I'll let him answer it, if he knows, unless he was there and knows, seen them go in there, I think unless he knows, otherwise, if he knows he can answer.

Q. 15. If you know Mr. Roaden, was anyone under eighteen in the theatre?

A. I was in the box office for this purpose, if for some reason I had to leave the box office, I had the Cashier instructed—

The Court: That's not the question, the question is whether they

(T. 48)

were under eighteen years of age—

Q. 16. Was any person under eighteen admitted to see this film?

A. Not except baby in arms.

Q. 17. At any time while this film was playing at Highway 27 Drive-In Theatre did you have any knowledge of the contents of the film?

A. I had no chance to see the film.

Q. 18. Had you received any complaints from anyone during the showing of this movie?

A. No, sir.

Q. 19. The first complaint you had about it was when Sheriff Phelps came to the projection booth?

A. Yes, sir.

Q. 20. On the 28th of September when Sheriff Phelps came to the projection booth how long had you been in the booth?

A. Maybe two minutes.

Q. 21. Why had you gone to the projection booth?

A. At the end of the picture I had told the operator—

Q. 22. Don't tell what you told him, just what you did?

A. I went to the projection room because the cartoon was on upside down.

Q. 23. You may ask him.

Cross-examination

Honorable Harold D. Rogers

Q. 1. Mr. Roaden, who owns the theatre?

A. Highway 27 Drive-In Incorporated.

Q. 2. Who are the stockholders of the corporation?

A. I don't know who they all are.

Q. 3. Do you know who any of them are?

A. I know one of them.

(T. 49)

Q. 4. Who is that?

A. O. G. Roaden.

Q. 5. Is he related to you?

A. My uncle.

Q. 6. Are you a stockholder?

A. No, sir.

Q. 7. You are employed by the corporation to operate this theatre here in Somerset?

A. Yes.

Q. 8. Where, Mr. O. G. Roaden, where does he live?

A. He lives in Harlan County.

Q. 9. Where are the headquarters of the corporation at?

A. The books give it in the office of Highway 27 Drive-In Theatre.

Q. 10. Who is President of 27th Drive-In Theatre, Incorporated?

A. I suppose he is.

Q. 11. Who is?

A. O. G. Roaden.

Q. 12. And you say the corporation hired you to operate the Highway 27 Drive-In Theatre?

A. Yes, sir.

Q. 13. What type duties do you have?

A. Well, see that everything is in working order, the picture is on the screen, if something tears up I have to fix it.

Q. 14. You say that you don't do the booking about what pictures you show, who does that?

A. A booking combine.

Q. 15. Where are the headquarters?

A. I don't know really.

Q. 16. Are they in Somerset, Kentucky?

A. I don't think so.

Q. 17. Where do you get your films from?

(T. 50)

A. A truck brings them and drops them off at the door.

Q. 18. Do you know where the truck comes from?

A. Most all in this area comes from Cincinnati.

Q. 19. Is that where the booking combine is?

A. I don't know, I really don't know.

Q. 20. You are telling the jury that you don't know where these films you show come from?

A. No, sir, I'm telling the jury that they come from Cincinnati.

Q. 21. But you don't know who brings them?

A. Well, sometimes my brother does.

Q. 22. Who is your brother?

A. Ketrey Roaden—

Q. 23. Who is he working for?

A. Well, I don't know who you would say he works for I suppose he probably works for the same organization I do under a different name.

Q. 24. You mean there is another name of the same organization?

A. Well, no, the organization he works for operates other organizations.

Q. 25. You mean they have other theatres?

A. Yes.

Q. 26. Where are they located?

A. London, Harlan, Middlesboro.

Q. 27. Is that operated by the same corporation that your uncle heads up?

A. Which ones?

Q. 28. The ones you have just mentioned?

A. No, sir.

Q. 29. Well who operates these other theatres you are talking about?

Honorable P. K. Wicker: Objection to this line of questioning, we doubt if

(T. 51)

this is proper—

The Court: I'll sustain the Objection as to operating any other theatres.

Q. 30. Now, in your position as manager or operator of this theatre here is it your job to project on the screen and schedule the showing of movies that come to Somerset at your theatre?

A. Well, you see, I have a list of the names of movies and the dates they play and when they come in that's the ones I play.

Q. 31. I see, that's what I say it's your duty to show the film?

A. Yes.

Q. 32. Do you know when Cindy and Donna played Highway 27 Drive-In Theatre?

A. Well, no the pictures behind me I don't know but I suppose you have the date correct.

Q. 33. September the 29th, Tuesday?

A. I would say that you have it correct.

Q. 34. And did it also show on September the 28th?

A. It showed Sunday, Monday and Tuesday.

Q. 35. So it showed then on Sunday the 27th of September and Monday the 28th and Tuesday the 29th, is that correct?

A. Yes, sir.

Q. 36. And is it your testimony, Mr. Roaden, during those three showings of the motion picture that you did not see the motion picture?

A. Yes, sir, I did not.

Q. 37. Its your job to see that those movies—are projected on the screen of Your theatre?

A. Well, its not my job, its my job to—you see—I have an operator, now if the operator hadn't come—

(T. 52)

Q. 38. I ask you this question, is it not your responsibility as manager and operator of that theatre, to see that the movies that come there are projected on the screen in that theatre at the scheduled time?

A. Now I am not the operator of the projector room.

Honorable M. D. Harris: Now, answer the question—

Q. 39. Your Honor, I asked the witness a question—

The Court: Yes, read the question to him—

Reporter: I ask you this question, is it not your responsibility as manager and operator of that theatre, to see that the movies that come there are projected on the screen in the theatre at the scheduled time?

A. Yes, it is.

Q. 40. Now you don't stay at that box office down there all the time, do you, Mr. Roaden?

A. No, sir, I don't.

Q. 41. Where do you stay when you are not at the box office?

A. Well I go around over the field to see if everything is all right and I have a snack bar inside and lots of times I have to be in there.

Q. 42. You have a waitress in there that operates that?

A. No, I operate it myself.

Q. 43. You don't have a waitress who operates that?

A. Oh I have a waitress but she is just a waitress.

Q. 44. Well, she sells the popcorn and cokes and such as that?

A. Well, if she don't, I do.

Q. 45. Now you said you were going over the grounds, what do you mean going over the grounds?

(T. 53)

A. Well, to see if anyone is making a racket, and tearing things up.

Q. 46. Do you announce on the speaker system in your own voice?

A. Yes, sir.

Q. 47. Where do you announce that from?

A. From the projection room during intermission when no movie would be going on.

Q. 48. And it is your testimony that during the three nights that this motion picture was shown in your theatre, that during all of your travels about the grounds, inside the projection booth and the concession stand or anywhere that you were, that you did not see the moving picture on any of those three nights at your theatre?

A. I did not see the motion picture any one of the three nights.

Q. 49. Now, you said that you were not in the box office all the time and then you said that no one under eighteen years of age was in your theatre, is that correct or not?

A. That is correct.

Q. 50. How are you able to say from your own knowledge?

A. From my own knowledge.

Q. 51. From your own knowledge?

A. Because I have a competent cashier.

Q. 52. Well, is she here?

A. No, she is not here.

Q. 53. Well, I thought you said that was from your own knowledge?

A. That's how I got my own knowledge.

Q. 54. Well, then that's from her knowledge, isn't it?

A. Well—

(T. 54)

Q. 55. Then you can't say—swear to this jury beyond any question of a doubt that no one under eighteen was in that theatre, from your own knowledge?

A. Well, no, because some one could have come in, in the trunk.

Q. 56. That's all.

Honorable P. K. Wicker: Stand aside.

Defense Closes.

(T. 94)

ARGUMENT OF COUNSEL FOR DEFENDANT

Honorable P. K. Wicker: May it please the Court—

The Court: Mr. Wicker.

Honorable P. K. Wicker: Mr. Rogers and you twelve ladies and gentlemen of the Jury.

If the film which you saw yesterday was all that was on trial here, I would not be here, I would be good enough to tell you at the outset that, in behalf of Mr. Roaden, I am not going to get up here and defend the film observed yesterday nor the revolting scenes in it or try to argue or persuade you that those scene were not obscene.

What I do want to do is talk with you about though is Harry Roaden, because in connection with this film he is also on trial, Harry Roaden took the stand yesterday in his own defense after you had viewed this movie.

He testified that he did not own the Highway 27 Drive-In Theatre that he did not book or select the pictures that were shown

(T. 95)

there; Harry Roaden did not operate the machines that were showing the picture; Harry Roaden did not reap any profits from the showing of this picture to the persons who observed it, Harry Roaden worked there.

Now, he testified that even though this picture had shown for two days that he had duties, that he had duties in the cashier's booth, in the front of the theatre, that there were duties to be performed in the concessions stand and generally in running the theatre, and that he was not aware of the contents of the movie.

Now, ladies and gentlemen, I don't have any doubt but that you will find the content of that film obscene, but I do have doubt that you will find Harry Roaden guilty, as the court tells you in Instruction No. 3, of wilfully and unlawfully exhibiting to the general public an obscene motion picture film entitled "Cindy and Donna", the defendant having knowledge of the obscenity thereof—having knowledge of the obscenity thereof!

Now, ladies and gentlemen yesterday when all of you were called to the jury box, you were asked would you require the Commonwealth of Kentucky to prove this man guilty beyond a reasonable doubt and you each answered that you would require such proof and such evidence.

I submit to you today that there was not a line, phrase or word of evidence offered to you to prove that even though this film was shown down here, that this man Harry Roaden, who only worked there, was aware of its contents.

Nor is there a word, phrase or line of evidence offered by the Commonwealth over here that anyone that anyone under the age of eighteen years was admitted to this movie, or that any juvenile saw it or as bad or as revolting or as sinful as the movie was that anyone was harmed by it.

(T. 96)

While this film leaves little to recommend it, nothing to recommend it, the State has failed to prove that Harry Roaden had any knowledge that the film was obscene.

I call your attention to Instruction #6. The law presumes the defendant Harry Roaden, innocent until proved guilty beyond a reasonable doubt and if you have a reasonable doubt that the defendant has been proved guilty then you should find him not guilty.

Now, my friend, Mr. Rogers over here is very persuasive and no doubt he is going to get up and review with you scene by scene the disgusting elements of this film but if he does do that, that still does not mitigate the requirements that the State prove beyond a reasonable doubt that this man had knowledge of the obscenity of the film, nor has there been a line, phrase or word of evidence offered by anyone that anyone ever complained to Mr. Roaden that the film was obscene.

Harry Roaden is on trial but he only worked there, he didn't reap the proceeds from the film, he didn't operate the machines and he wasn't aware of the film's content, the State was required to prove him guilty beyond a reasonable doubt, I submit to you that although you may find that this film was obscene that you can still find Harry Roaden not guilty, because it has not been proven beyond a reasonable doubt that he knew the content of this film. Thank you very much.

(T. 97)

ARGUMENT BY COUNSEL FOR COMMONWEALTH

Honorable Harold D. Rogers: May it please the Court—

The Court: Mr. Rogers.

Honorable Harold D. Rogers: Mr. Wicker and Mr. Harris, ladies and gentlemen of the jury.

First I would like to say to Mr. Wicker and Mr. Harris what fine gentlemen they have been in the trial of this case at times we lawyers have difficulty in arguing our motions and different questions but these two gentlemen are gentlemen on all occasions I have found to be true, they are perfect gentlemen.

First of all, I would say to this jury, thank you, for being on this jury and taking time out of your busy schedule to serve on this jury, do your community and your county a service by fulfilling your duty by sitting on this case. I know for some of you, perhaps many of you, I am sure all of you, at times this has been embarrassing and I am sure it has tugged at your better conscience and your values, and I apologize for your having to view this motion picture but it is evidence in this case.

As we said in the beginning, when we asked you in the beginning if you realized that this was a criminal prosecution for which the defendant, if you Judge him guilty, may receive a jail sentence and money fine if the jury find him guilty, and all of you at least acknowledge by your seriousness that you are aware of that and so its no small matter but ladies and gentlemen of this jury, this is a vital case, this is an important case, perhaps the most important of this term of court, because it has most far reaching significance.

Before I say anything further I want to preface my remarks

(T. 98)

to you by saying that this is your chance, this is this jury's

chance, to do something about the filth and smut you saw yesterday, you have the opportunity not the United States Supreme Court, in this case, but this jury has that opportunity, these twelve people and no more.

And, I ask you in the name of the Commonwealth in this case, do something and do not worry about the far reaching consequences because bear this in mind, your decision in this case can and will have far reaching meaning and I urge you to bear that in mind as well.

This case is more important than a murder case because in a murder case the victim is at least dead and not to live a living death, in many cases as the smut and filth we saw yesterday may cause to those young adults that may view that moving picture, in their own cars, in that theatre, the living death that such a crime causes to many young adults is worse than murder; this case is worse than any pollution case that you can have before you because what can be worse than filth of the mind and spirit of those young people, I think than that sort of trash; this case is worse, I think, than any shooting with intent to kill or wounding someone with a knife or gun because in those cases the body has the ability to heal itself and become whole again but that kind of pollution to the body, mind and soul cannot be repaired then in many cases, it goes on forever in the life of the people affected by it, do something, this is your chance.

If we wish to live in a place that I can best describe by referring to Sodom and Gomorrah, does this moving picture remind you all of anything more like Sodom and Gomorrah than this movie is in obscenity, but if you wish those young adults who view that picture, if you wish

(T. 99)

those people to be saved from turning into a pillar of salt then you will declare this movie to be obscene and you will find this defendant guilty as charged.

Now, Mr. Wicker is absolutely correct, I am going to review portions of that moving picture to you, I don't think we need to, I think it is indelibly in your mind, you can't remove it. I realize that you, at the time you saw this picture, you were shocked beyond belief, you were amazed that this moving picture was shown to the general public out in Pulaski County, Kentucky, not once, but three consecutive times by this defendant, he comes here and has the audacity to say to you, I didn't know what was in it, I never saw it, I never saw one scene, I didn't notice, as I walked around the grounds in the projection booth or in the concessions stand or at the ticket booth on any one of the three nights I was there as the manager of that theatre, charged with the operation of the moving picture show, I didn't know what was being shown, despite the fact that in every scene there were at least two, three or four people completely nude on extremely compromising positions on beds, couches and floors, this man says he didn't know what his entertainment was, I think this jury is going to charge him with knowing what he shows at this moving picture theatre. I don't think you are going to tolerate this kind of activity, in this county, much less, I don't think you will tolerate this kind of defense in saying, excuse me, I didn't know what I was showing—

Honorable M. D. Harris: Your Honor, objection and we take exception, Mr. Wicker and I have presented a defense and we take exception to the remarks of Mr. Rogers—

The Court: I think the Commonwealth, as long as he stays in the

(T. 100)

record, he can refer to the defense that he made, let the objection be overruled.

Honorable Harold D. Rogers: Ladies and gentlemen of the jury, that you wouldn't want testified to on the interrupted argument, for that forgive me and not the case,

and I hope and trust that I am staying exactly within what the defendant told you or the reasonable conclusion, didn't this defendant come here and tell you, I didn't know what was in it, I think it was reasonable since he was the operator and manager, charged with the responsibility of showing the pictures that came there in his own words from a book corporation that is owned and managed by his Uncle and his brother, and I say to you that the corporation is nothing more than a—

Honorable M. D. Harris: Objection as to the opinion, there is no evidence about the corporation—

The Court: Yes, I will sustain the objection to that statement and the jury will not consider that for any purpose whatsoever.

Honorable Harold D. Rogers: I am sorry, Your Honor, referring to the defendant's statement, he himself, if you will recall, when I asked the defendant or maybe Mr. Wicker asked the defendant where he was when the sheriff came and he said he was in the projection booth, the sheriff testified the same things, when he went to get the film after it was shown, that the defendant was in the projection booth where the machines were but the defendant when he got on the stand said he had only been there about two minutes at that time, he testified the reason he went in the projection booth was to tell the operator that the comic, the cartoon, was shown upside down, he went in

(T. 101)

there to ask him to change it, ladies and gentlemen, if he noticed the cartoon, surely he was going to notice the main headline feature so I don't think this jury is going to deal too much with the statement the defendant didn't know what was showing.

I would like to review the motion picture, Mr. Wicker has already told you he considered it to have no value whatever, a sinful moving picture, I am sure this jury has

no reservations about that, and the teachings that that moving picture has for the young adults and everyone else that goes to see that picture, now, bear in mind, and I am sure you will, that those young adults that go to see that picture in their cars, alone late at night and in the drive-in theatre, that that moving picture has teachings just as important, stay in their young lives and much more intently in their minds than any teachings they receive in school or Sunday school and church.

Because the teachings in this motion picture and that these things that are portrayed on the screen are commonplace by people of that age group, that it is common practice to do what they do, it is the thing to do, and if you don't do it, you are some kind of a chicken, assuming was there things, made them of all teachings or involved not just nudity or going with not much clothing on, that's not the particular teaching, the picture teaches adultery by the husband who leaves his wife and daughter and step daughter at home and goes out on the town, drinking and cavorting and finally winds up in bed with this nude dancer after her dance at a night club, you obviously saw the scene of the dancer and the husband on the couch together, shocking to the conscience to see such portrayed on a public screen, the drunken mother at home abandoning the

(T. 102)

two children, passed out on the bed, watching TV drunk while her daughter slips out the back door and goes out to the back grounds to a car beside the house and portrayed the scene making love to her boy friend under the influence of marihuana.

Meanwhile, the scene shifts back from the mother in bed, drunk and passed out, to the daughter, the step daughter in the car making love to the young man smoking marihuana, then it shifts back to the house in the bed to the prostitute, these are the teachings of this moving

picture, these are the teachings in our community to the young adults who go down there and watch that film at that theatre at night and the statements that are made in the motion picture, I recall one I made a note of at the time the girl there would make the statement, things are groovy when you are high, similar statements about the effects of marihuana and drugs or sex, and the 17 year old half sister of the young girl in the car, sneaks out of her bedroom and watches the entire proceedings, she said the next day, viewed her sister until she was completed, and then the mother of one of the girls is on her bed drunk, one of a number of the most revolting scenes in the moving picture was when Pete comes in drunk after he was unsuccessful in his attempt to contact the dancer, and while under the influence of some type of beer or liquor he crawls into the bed with his naked step daughter and the lewd and obscene that follows that.

Now, this is the teachings of this picture, we needn't talk about the influence that it has on people, that goes unspoken, Susan, friend of Cindy together on the beach, Susan out to teach Cindy some of the worst lewd scenes in the beach cabin between the two young girls and the two young men, can there be any mistake about what the

(T. 103)

moving picture shows, on the occasion with the man while Cindy is fighting off her supposed lover, can there be any doubt about what is shown, then Cindy makes her decision to get high on drugs of her sister's which she has found bearing in mind that Cindy is 17 years old, then one of most revolting scenes that the picture depicts is the actions between Cindy and the girl named Susan in the moving picture, the next morning the scene when Susan speaks to Cindy and thereby the world and all who viewed the motion picture sees themselves, she said to Cindy, you have got to try the real things, this thing between us is something thats

just passing, you've got to try the real thing, get you a boy friend, go out with him, you've just got to be with a man and so on and so forth, then Cindy takes off on her own then to find her own men, meanwhile her older sister is in a nude picture taking scene with three or four young men who after finishing taking pictures attempt and do take other things, while one of them, her supposed boy friend, sits off on the couch laughing and sneering, can there be any doubt about the teachings it has for young adults that go to see it, and all other people, can there be any doubt that this jury should find that the motion picture, No. 1 is obscene as the court has allowed you to do on the instructions and No. 2, to show your intolerance of this sort of thing by finding the defendant guilty of showing this motion picture.

Now, and about the instructions, read the instructions, don't get confused about the high sounding words and phrases that the law is made up of, don't get away from the simple issues, there are two things that the Commonwealth would like for you to do, No. 1, find the motion picture obscene and write your verdict on the back of the instructions.

(T. 104)

No. 2 to find the defendant guilty of showing that motion picture and fix his punishment as the jury sees fit and secondly write on the back of the instructions a second verdict, you've got to do both if you find the defendant guilty, write two different verdicts, but don't get confused, as I have said before by the complicated wording, I don't believe this jury will tolerate this sort of smut and filth being shown in Pulaski County, Kentucky, by anyone.

Bear in mind those instructions, they don't require the accused to be the owner of the picture or have control about what pictures are shown, although this defendant by his own testimony says he was the manager and operator and

had duties of showing the motion picture but the instructions and the law don't require anything more than the picture be shown with knowledge of its obscenity.

I don't believe the jury will tolerate that, now is the time, you have the opportunity in your hands as no one else does, to stand firm, to stand up, to stand up, to say yes, I can do something, I will do something, I will do something, my actions will be heard from a long way, this is your chance, this is your time, again, thank you.

You've got to do both if you find the defendant guilty, write two different verdicts, but don't get confused as I have said before don't get confused.

Thank you for trying this case and for listening for I know that your verdict whatever it may be will come from the hearts and minds and souls of twelve very important people of Pulaski County, Thank you.

.

INSTRUCTIONS OF PULASKI CIRCUIT COURT TO JURY

(R. 9-12)

The Court instructed the jury as follows:

Commonwealth of Kentucky - - - - Plaintiff

v.

Harry Roaden - - - - Defendant

INSTRUCTIONS

Instruction No. 1

If the jury believe from the evidence beyond a reasonable doubt that the motion picture film, "Cindy and Donna", is obscene then the jury will find the said motion picture film, "Cindy and Donna" to be obscene. You will then

write your verdict on the back of these instructions in the following manner:

"We the jury find the motion picture film entitled, 'Cindy and Donna' to be obscene."

Instruction No. 2

If the jury believe from the evidence beyond a reasonable doubt that the motion picture film, "Cindy and Donna", is not obscene then the jury will find said motion picture film, "Cindy and Donna" not to be obscene and find the defendant not guilty. You will then write your verdict on the back of these instructions in the following manner:

"We the jury find the motion picture film entitled, 'Cindy and Donna', not to be obscene and find the defendant not guilty."

Instruction No. 3

If the jury find from the evidence beyond a reasonable doubt that the motion picture film, 'Cindy and Donna', is obscene, and,

If the jury further believe from the evidence beyond a reasonable doubt that in the County of Pulaski, State of Kentucky, on or about the 29th day of September, 1970, and within 12 months before the finding of the indictment herein, the defendant, Harry Roaden, wilfully and unlawfully exhibited to the general public an obscene motion picture film entitled, "Cindy and Donna", the defendant having knowledge of the obscenity thereof, if it was obscene, then the jury shall find the defendant, Harry Roaden, guilty as charged in the indictment and fix his punishment at a fine of not more than \$1,000.00 or by imprisonment in the Pulaski County Jail for not more than six months or by both such fine and imprisonment in your discretion.

If you find under the instruction No. 3, you will write your verdict on the back of these instructions.

Instruction No. 4

"Obscene" as used in these instructions means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and the dominant theme of the material, taken as a whole, is patently offensive because it affronts contemporary community standards which are national in character relating to the descriptions and representations of sexual matters; and the material is utterly without redeeming social value and that all of the above requirements as used in this definition must coalesce and exist at the same time.

The word "prurient" as used in these instructions means impure in thought; lustful; sensual and sex desire.

Instruction No. 5

You are further instructed that the definitions of said words and phrases contained in these instructions are as follows:

"Average" means norm or middle way between two extremes.

"Contemporary" means gauge, definite, rule, principle or measure.

"Predominant" means to prevail or to have mastery.

"Morbid" means taking an excessive interest in matters of a gruesome or unwholesome nature; hideous; monstrous, frightful.

"Excretion" means useless or harmful material.

"Candor" means disposition to fairness, impartiality out-spoken, frankness.

Instruction No. 6

The law presumes the defendant, Harry Roaden, innocent until proved guilty beyond a reasonable doubt, and if you have a reasonable doubt that the defendant has been proved guilty then you should find him not guilty.

Instruction No. 7

If you find a verdict in this case all 12 jurors must agree. One juror may sign the verdict adding after his or her name the word "Foreman".

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

71-1184

HARRY ROADEN, Petitioner

versus

COMMONWEALTH OF KENTUCKY, . . . Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY**

PHILLIP K. WICKER
120 North Main Street
Somerset, Kentucky 42501
Attorney for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

HARRY ROADEN, - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above entitled case on December 17, 1971.

Citation to Opinion Below

The opinion of the Court of Appeals of Kentucky is reported at 473 S. W. 2d 814, and printed in the Appendix, *infra*, pp. 21-38. It affirmed the judgment of the Pulaski Circuit Court, which is printed in the Appendix, *infra*, pp. 25-30.

Jurisdiction

The judgment of the Court of Appeals of Kentucky was entered on December 17, 1971. The Court of Appeals of Kentucky denied a rehearing on December 17, 1971. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

Questions Presented

1. In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material, a violation of due process of law?
2. In an obscenity prosecution, do the First and Fourteenth Amendments require proof of a concern for juveniles, invasion of privacy, or pandering?

Statute Involved

Kentucky Revised Statutes, Chapter 436, Section 101 provide in pertinent part as follows:

436.101 Obscene matter, distribution, penalties, destruction.

(1) As used in this section:

(a) "Distribute" means to transfer possession of, whether with or without consideration.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or

any other articles, equipment, machines or materials.

(c) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters.

(d) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(2) Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than \$1,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars, or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter and which is involved in the offense, such basic maximum and additional day not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this subsection, he is punishable by fine of not more than \$2,000 plus five dollars for each additional unit of material coming

within the provisions of this chapter, which is involved in the offense, not to exceed \$25,000, or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If a person has been twice convicted of a violation of this section, a violation of this subsection is punishable by imprisonment in the state penitentiary not exceeding five years.

* * * * *

(8) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the (title or description of matter) to be obscene," or "We find the (title or description of matter) not to be obscene," as they may find each item is or is not obscene.

(9) Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the Attorney General, Commonwealth's attorney, county attorney, city attorney or their authorized assistants, or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

Statement of the Case

On October 21, 1970, the petitioner was convicted following a jury trial for violation of Kentucky Revised Statutes Chapter 436, Section 101. He was sentenced to pay a fine of \$1,000 and to serve six months in the Pulaski County Jail. A timely appeal was taken to the Court of Appeals of Kentucky, and the conviction was affirmed.

The facts upon which the conviction was based are as follows:

On the night of September 29, 1970, the Sheriff of Pulaski County, Kentucky, purchased a ticket to Highway 27 Drive-In Theatre located south of the City of Somerset, on U. S. Highway 27 in Pulaski County, Kentucky (T. 20, 31).¹ Being exhibited at the theatre that evening was a film entitled "Cindy and Donna" (T. 21). After viewing the entire film, the Sheriff proceeded to the projection booth and there arrested petitioner, the manager of the theatre, upon a charge of exhibiting an "obscene" film to the general public (T. 22). At the same time and place the Sheriff seized the film consisting of five reels in two metal canisters (T. 22, 25-27, 31).

On the day following the arrest of the petitioner and seizure of the film, the Sheriff appeared before the Grand Jury of Pulaski County, and as a result, an indictment was returned charging petitioner with the offense of which he was convicted (T. 22).

¹"T" refers to the transcript of the trial in the Circuit Court of Pulaski County. Excerpts from this transcript are printed in the Appendix, *infra*, pp. 28-29, 32, 35-36.

Upon the trial in Pulaski Circuit Court, the Sheriff and one of his deputies were the only witnesses for the prosecution (T. 20-31, 34-37). The Sheriff was permitted to give a brief description of the film stating that it revealed the nakedness of the human body and displayed "intimate love scenes" (T. 24). The Sheriff further stated that upon viewing the film, he, on his own, determined that it appealed to prurient interest, such determination on his part leading to the arrest and seizure (T. 27). Admittedly, the Sheriff had no warrant when he made the arrest and seizure, and there had been no hearing of any kind before a judicial officer and no adversary hearing to focus on the question of obscenity (T. 31, 32, 34).

The Deputy Sheriff testified that the Sheriff had ordered him to "keep an eye" on the theatre (T. 35). This witness stated that he viewed only the final thirty minutes of the film "Cindy and Donna" from a vantage point on a road outside the theatre (T. 35, 36).

Following the testimony of the Deputy Sheriff, the jury was permitted to view the film at a local indoor theatre (T. 41).

Petitioner testified in his own behalf (T. 46). He stated that no juveniles had been admitted to see the film, and that he had received no complaints about the film until it was seized by the Sheriff (T. 48, 53).

How the Federal Questions Were Raised

The question of illegal seizure of the film in violation of due process of law because there was no prior adversary hearing was raised by a motion to suppress the film as evidence filed eight days before the trial and heard by the circuit judge four days before the trial (R. 6-8).² This motion is printed in the Appendix, *infra*, pp. 33-34. The motion to suppress was overruled by the Pulaski Circuit Court on the first day of petitioner's trial (T. 4). The motion to suppress was renewed at the time the film was introduced in evidence, and again overruled by the Circuit Court (T. 26, 27). Excerpts from the transcript of petitioner's trial which embody the rulings of the Pulaski Circuit Court upon the motion to suppress the evidence are printed in the Appendix, *infra*, pp. 33-34. The issue was thereafter raised upon appeal to the Court of Appeals of Kentucky by assignment of the denial of the motion to suppress as error. The "Statement of the Questions Presented" contained in petitioner's Brief before the Court of Appeals of Kentucky is printed in the Appendix, *infra*, p. 37. The question was again raised in the Court of Appeals of Kentucky in petitioner's Petition for Rehearing in that Court. The "Statement of the Questions Presented" in petitioner's Petition for Rehearing before the Court of Appeals of Kentucky is

²"R" refers to the transcript of pleadings prepared by the Circuit Court Clerk of Pulaski County in connection with the indictment and trial of petitioner. This transcript is separate from the transcript of evidence received upon the trial which is referred to herein as "T".

printed in the Appendix, *infra*, p. 37. The rejection by the Court of Appeals of Kentucky of this assignment of error is shown by the Opinion of the Court of Appeals of Kentucky contained in the Appendix hereto at pp. 25-30, and the Mandate of the Court of Appeals of Kentucky contained in the Appendix hereto at p. 31.

The question whether the prosecution was required by the First and Fourteenth Amendments to prove concern for juveniles, invasion of privacy, or pandering was raised at the close of the evidence upon the trial in circuit court by way of motion for a directed verdict as follows (T. 55):

"Defendant further moves for a directed verdict for the reason there is no showing in this case that the showing of the film in question had any effect on juveniles, that there was any pandering involved or any invasion of privacy as required by *Redrup v. State of N. Y.* U. S. 386-767 which is cited by the Supreme Court in overruling *Cain v. Commonwealth* in 90 Supreme Court."

This motion was overruled by the Pulaski Circuit Court, the trial judge stating simply that he did not think the question possessed any merit (T. 56). This issue was thereafter raised upon appeal to the Court of Appeals of Kentucky by assignment of the denial of the motion for a directed verdict as error. The question was treated in petitioner's Brief before the Court of Appeals of Kentucky, and again in petitioner's Petition for Rehearing in that Court as shown by the Statement of the Questions Presented in both the Brief and

Petition for Rehearing printed in the Appendix, *infra*, p. 37. Specific reference was made to *Redrup v. New York*, 386 U. S. 767, and that case thoroughly discussed in arguments to the Court of Appeals of Kentucky in both documents. The rejection by the Court of Appeals of Kentucky of this assignment of error is shown by the Opinion of the Court of Appeals of Kentucky contained in the Appendix hereto at pp. 25-30, and the Mandate of the Court of Appeals of Kentucky contained in the Appendix, *infra*, at p. 31.

REASONS FOR GRANTING CERTIORARI

- I. The Denial of an Adversary Hearing Prior to Seizure of the Film in This Case is Inconsistent With the Decisions of this Court, and Amounts to a Flagrant Violation of Due Process of Law.

Petitioner's conviction has received wide publicity. The conviction is a giant step in a march backward for all mankind. If the conviction stands local law enforcement officers all over the country will be greatly emboldened to carry out additional unconstitutional seizures, and the liberty of the individual will erode to naught. The action of the Sheriff of Pulaski County, Kentucky, in seizing this film upon his own determination of its obscenity without any warrant, without any prior adversary hearing, and without any prior judicial scrutiny at all clearly abridged rights guaranteed to petitioner against state action by the First and Fourth Amendments through the Fourteenth Amendment of the Constitution of the United States of America. The decision of the Court of Appeals of Kentucky that the

seizure was proper rests in direct contravention of clear pronouncements of this Court that an adversary hearing must precede the seizure of allegedly obscene material. Thus in *Marcus v. Search Warrant of Property*, 367 U. S. 717 (1961), it is pointed out that constitutional protections for free expression limit a State's power to suppress obscenity and,

"It follows that a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the consequences for constitutionally protected speech."

Moreover:

"We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainants to be obscene."

And further:

"* * * discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously de-

ficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantee."

Even if a judicial inquiry precedes the seizure, it is still not enough to satisfy "due process" requirements for protection of free expression. Thus in *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964), an *ex parte* inquiry by a judge prior to issuance of a warrant directing seizure of a stack of paperback novels was held to be constitutionally deficient. This Court said:

"For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of nonobscene books."

A seizure of materials alleged to be obscene is subject to much more stringent scrutiny under the Constitution than a seizure of ordinary contraband such as drugs or gambling equipment. In such instances because the right of freedom of expression is involved the constitutional procedures to which the accused is entitled, are much more complicated. To the end that the accused is not deprived of due process, a law enforcement officer cannot take it upon himself to determine that a book or film is obscene and proceed to seize it. There must be a prior adversary proceeding. Such is the teaching of the *Marcus* and *Books* cases.

But the Court of Appeals of Kentucky in its Opinion says that the *Marcus* and *Books* decisions "relate

to seizure of allegedly obscene material for destruction or suppression, not to seizures incident to an arrest for possessing, selling, or exhibiting a specific item" (Appendix, *infra*, p. 26). Those decisions are thus distinguished by the Kentucky Court on the basis that the showing of this film was a crime committed in the presence of the arresting officer. There is no logical basis for such a distinction. In *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2d Cir. 1969) it was recognized that "a motion picture like a book, is entitled to the protection of the first amendment. * * * That protection includes the requirement that an adversary hearing be provided before the allegedly obscene works can be seized." The Court in *Bethview* went on to point out that there can be no difference in due process requirements between the seizure of a large number of books and the seizure of the single print of a motion picture film:

"We are told that the Bethview Theater has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4,000 individuals would see the film. Preventing so large a group in the community from access to a film is no different in the light of first amendment rights from preventing a similarly large number of books from being circulated."

On this same reasoning the distinction made by the Kentucky Court of Appeals between this case and the *Marcus* and *Books* cases is completely unreasonable. In *Cambist Films, Inc. v. Duggan*, 420 F. 2d 687 (3rd Cir. 1969) the United States Court of Appeals, Third

Circuit rejected the notion that the seizure of the film in that case was lawful if made incident to a lawful arrest without a warrant for a crime committed in the presence of the arresting officer, saying:

"We cannot agree with the basic premise of the district court that police officers may, after viewing a motion picture themselves, determine whether it is obscene and, if they determine it to be obscene, proceed to arrest the exhibitor and seize the film without a warrant. On the contrary, it is now settled that the First and Fourteenth Amendments to the Constitution require that there be an adversary judicial hearing and determination of obscenity before a warrant may be issued to search and seize alleged obscene materials. *Marcus v. Search Warrants*, 1961, 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127; *A Quantity of Copies of Books v. State of Kansas*, 1964, 378 U. S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809. Such a hearing and determination is *a fortiori*, required where officers, as in this case, seize without a search warrant materials alleged by them to be obscene. For such a non-judicial *ex parte* determination does not afford the owner due process of law."

The same view of this question has been expressed by a number of other United States Courts of Appeals in the following cases: *Astro Cinema Corp. v. Mackell*, 422 F. 2d 293 (2d Cir. 1970); *Demich, Inc. v. Ferdon*, 426 F. 2d 643 (9th Cir. 1970); *Metzger v. Percy*, 393 F. 2d 202 (7th Cir. 1968); *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969) Cert. den., 396 U. S. 985 (1969). These authorities attest there is no valid rea-

son for not applying the rationale of *Books* and *Marcus* to the instant case. While in the ordinary case a search incident to an arrest is not unreasonable if the arrest itself is lawful, the First Amendment compels more restrictive rules in cases in which the arrest and search relate to alleged obscenity. Determination by law enforcement officers of the status of films whether obscene or not is not enough protection to the owner to constitute due process. It is incongruous to condemn, as vesting too abundant discretion in the enforcing officer, a search and seizure made on an overly broad warrant while at the same time permitting officers an unfettered discretion in seizures effected without a warrant under the guise of being incident to arrest. In both circumstances constitutionally compelled procedural safeguards are lacking. The Court of Appeals of Kentucky erred most flagrantly in concluding that an adversary hearing was not required before seizure of the film in question.

In *Mapp v. Ohio*, 367 U. S. 643 (1961) it was established that material seized by *state* officers in violation of the Due Process Clause of the Fourteenth Amendment is not admissible as evidence in a *state* court. Through the Due Process Clause of the Fourteenth Amendment both the First Amendment protection of free speech and the Fourth Amendment protection against unreasonable searches and seizures are restrictions upon the states. *Gitlow v. New York*, 268 U. S. 652 (1925); *Ker v. California*, 374 U. S. 23 (1963). Motion pictures are protected by the First and Fourteenth Amendments from state action that would

abridge freedom of expression. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952). Application of an obscenity law to suppress a motion picture requires ascertainment of the "dim and uncertain line" that often separates obscenity from constitutionally protected expression. *Jacobellis v. Ohio*, 378 U. S. 184 (1964).

In *Lee Art Theatre v. Virginia*, 392 U. S. 636 (1968) this Court reversed the conviction of a motion picture operator charged with showing obscene pictures in violation of Virginia statutes. There, seizure of the films was carried out on the basis of an affidavit of a police officer which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard in front of the theatre, that the films were obscene. The Court pointed out that admission of the films in evidence required reversal of the petitioner's conviction. In this case the petitioner sought suppression of the film before his trial and again objected to its admission at the trial. Upon the authority of *Lee Art Theatre* and the other decisions of this Court herein referred to, admission in this case of the illegally seized film requires reversal of petitioner's conviction.

Borderline speech must be protected by the application of elaborate procedures prior to suppression via seizure. Such procedures are impossible to follow in a seizure incident to arrest such as occurred in this case. Only a tenacious adherence to such procedures assures a free society that the sensitive determination of obscenity will be made judicially and not *ad hoc* by police officers in the field. Here, no prior procedures

whatsoever were followed. The petitioner has been denied due process of law as a result of the illegal seizure of the film and erroneous admission of it in evidence. Certiorari should be granted to vindicate petitioner's rights and to redress the flagrant violation of due process of law which has been sanctioned by the Kentucky Court of Appeals.

II. The Prosecution Failed to Prove a Single One of the Essential Elements of an Obscenity Prosecution as Enunciated in *Redrup v. New York*, and the Important Federal Question as to Whether Such Proof is Constitutionally Required Was Decided by the Court of Appeals of Kentucky in a Way Not in Accord With Applicable Decisions of This Court.

In *Redrup v. New York*, 386 U. S. 767, reh. den. 388 U. S. 1924 (1967) this Court said:

"In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles (citation omitted). In none was there any suggestion of an assault upon privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it (citation omitted). And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U. S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942."

The Court of Appeals of Kentucky in its Opinion, Appendix, *infra*, pp. 25-30, completely ignored the *Redrup* decision, and did not cite it or refer to it in any

way. However, the Redrup decision is of paramount importance not only because in it there is a redirection of emphasis on the elements of obscenity in the legal and constitutional sense, but because of the very reliance placed on the decision by this Court in a long line of per curiam reversals which have occurred subsequently.³ The divergent attitudes of members of this Court were noted in Redrup, but the Court concluded that whatever constitutional view was brought to bear on the cases there under consideration it was clear the judgments could not stand. Examination of the opinion of the state courts in the majority of the cases summarily reversed by this Court with citation to Redrup, makes it clear that the prosecution in an obscenity case will fail unless there is a showing juveniles have been exposed to the material, there was pandering, or someone was unwillingly exposed to the material. In the state court cases so reversed, none of these elements was shown, and they are absent in this case. Redrup provides a sensible test consonant with the First and Fourteenth Amendments in that it protects the average normal adult in his right to read, view, and hear what he pleases. Any other rule would reduce the rights of adults to read, view and hear only what is fit for children. This view of Redrup is fortified by a number of other decisions which have applied its test. Grant

³A few of these per curiam reversals are: *Keney v. New York*, 388 U. S. 440 (1967); *Friedman v. New York*, 388 U. S. 441 (1967); *Cobert v. New York*, 388 U. S. 443 (1967); *Ratner v. California*, 388 U. S. 442 (1967); *Felton v. City of Pensacola*, 390 U. S. 340 (1968); *Robert Arthur Management Corp. v. Tennessee ex rel canal*, 389 U. S. 578 (1968); *Carlos v. New York*, 396 U. S. 119 (1969); and *Cain v. Kentucky*, 397 U. S. 319 (1970).

v. United States, 380 F. 2d 748 (9th Cir. 1967); Luros v. United States, 389 F. 2d 200 (8th Cir. 1968); People v. Bonanza Printing Co., 76 Cal. Rptr. 379 (1968); State v. J. L. Marshall News Co., 13 Ohio Misc. 60, 232 N. E. 2d 435 (1968); Poulos v. Rucker (M.D. Ala.), 288 F. Supp. 305 (1968); People v. Stabile, 58 Misc. 2d 905, 296 N.Y.S. 2d 815 (1969); Olsen v. Doerfler, 14 Mich. App. 428, 165 N. W. 2d 648 (1968); and United States v. 4,400 Copies of Magazines, 276 F. Supp. 902 (D.C. Md. 1967).

It is clear that under Redrup the persons to whom the allegedly obscene material is offered commercially, and the methods by which it is offered, are factors to be considered in determining whether dissemination of the material is protected by the First and Fourteenth Amendments. Redrup thus approaches the problem by reference to the circumstances under which publication of the material might constitutionally be restricted. If none of those circumstances are present, as is true in this case, then the obscenity prosecution must fail. In this case there is not a single syllable of evidence that any juveniles saw the film "Cindy and Donna". The uncontradicted testimony of the appellant was that scrupulous care was taken to avoid the admission of any juveniles into the theatre to see this film (T. 48, 53). The Sheriff of Pulaski County observed no juveniles present, and there are no circumstances shown in this record from which it could be inferred that any juveniles viewed the film (T. 33). The prosecution did not even contend that any juveniles viewed the film. Therefore, any "limited state concern" for juveniles has not

been impugned by the exhibition of this motion picture. At no place in the record can any one find any evidence that a single person was unwillingly exposed to this film or that the privacy of a single soul was invaded by its exhibition. There is no evidence in this record to indicate there was any "pandering" of this film to the public. There is not even any evidence that it was advertised in the newspapers or on the radio.

The paramount importance of this case is beyond expression in words. Petitioner's constitutional rights have been mercilessly ignored by the courts of Kentucky. It appears an exercise in futility to assert federal constitutional rights in the tribunals of Kentucky. The conviction is grossly inconsistent with Redrup. If this conviction stands, there will be many others like it, and this nation will be a long way down the road to a police state. We implore the Court to grant certiorari and apply the constitutional safeguards necessary to vindicate petitioner.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted to review the judgment of the Court of Appeals of Kentucky.

Respectfully submitted,

PHILLIP K. WICKER
120 North Main Street
Somerset, Kentucky 42501

Attorney for Petitioner

March, 1972

Judgment of the Pulaski Circuit Court

PULASKI CIRCUIT COURT

Regular October Term

8th day of the term

OCTOBER 20, 1970

COMMONWEALTH OF KENTUCKY, - - - Plaintiff,
v.

HARRY ROADEN, - - - Defendant.

ORDER # 4432 Showing Obscene Picture

This day this cause came on for trial. The defendant was represented by Hon. Phillip Wicker and Hon. M. D. Harris, and he entered a plea of not guilty to the above charge. The following jury was empaneled and sworn to try the case:

Lewis Ledbetter

Neal Childers

Lynn T. Minter

Carl Helton

Walter Clines

Mrs. Donald Pullen

Mrs. Ernest Brock

Augusta Latham

Eugene Tucker

Orville Alexander

Paul Elliott

Mrs. Henry Gilmore

The Commonwealth's Attorney read the indictment and stated the plea of the defendant to the jury. The Commonwealth presented all of its evidence and announced closed, following which the defendant began introducing his evidence, and being unable to finish it was ordered that court adjourn until 9:00 A. M. October 21st, 1970.

By agreement of counsel for Commonwealth and counsel for defendant the jury was permitted to go to their respective homes, after the court gave to the jurors all of the admonitions required by law.

/s/ Lawrence S. Hail, Judge
Pulaski Circuit Court

October 21, 1917

ORDER - Jury Deliberation - Opening Picture

This day the case came on for trial. The defendant was represented by Hon. Philip Winter and Hon. M. D. Harris, and he entered a plea of not guilty to the above charge. The following jury was empaneled and sworn to try the case:

Lawrence Hail, Judge	Mrs. Emma Black
Neal (Hill)	James (Hill)
Lyons T. Hinton	James T. Hinton
Carl (Hill)	Orville Alexander
Walter (Hill)	Paul (Hill)
Mrs. Emma Black	Mrs. Emma Black

The Commonwealth's Attorney read the indictment and stated the plea of the defendant to the jury. The Commonwealth called all of its evidence and announced its case. Following which the defendant began introducing his evidence, and being unable to finish it was ordered that court adjourn until 9:00 A. M. October 21st, 1917.



PULASKI CIRCUIT COURT

Regular October Term

9th day of the Term

OCTOBER 21, 1970

COMMONWEALTH OF KENTUCKY, - - - - Plaintiff,

v.

HARRY ROADEN, - - - - Defendant.

VERDICT # 4432 Showing Obscene Motion Picture

Court met pursuant to adjournment, at the hour of 9:00 A. M. Clerk polled the jury and each juror answered present. Thereupon the defendant announced closed and the court instructed the jury, who after hearing argument of counsel, the jury retired to their jury room to deliberate, and after due deliberation returned into open court the following verdicts:

"This jury finds the motion picture Cindy and Donna obscene. Foreman Paul Elliott. We the jury finds the defendant Harry Roaden guilty as charged set his punishment \$1000 fine and six months in jail. /s/ Paul Elliott, Foreman."

It is therefore ordered and adjudged that the Commonwealth of Kentucky recover of the defendant Harry Roaden the sum of \$1000.00 and costs together with interest at the rate of 6% per annum from date until paid and that he further be confined in the County Jail for a period of 6 months. If the defendant fails to pay or replevy said fine and costs at the expiration of his jail sentence it is

ordered that he further be confined for a period of 1 day for each \$2.00 of his unpaid fine and costs.

The court further ordered that the bond as to Harry Roaden be increased to \$1500.00.

Thereupon came counsel for the Commonwealth and moved the Court to enter an order confiscating the 5 reels of film introduced in evidence as the Motion Picture "Cindy and Donna", it being indicated to the court by counsel for defendants that an appeal would be prosecuted, the court took the said motion under advisement.

/s/ Lawrence S. Hail, Judge
Pulaski Circuit Court

Opinion of the Court of Appeals of Kentucky

RENDERED: June 25, 1971,

Opinion as modified on denial
of Rehearing, December 17, 1971**COURT OF APPEALS OF KENTUCKY**Appeal from the Pulaski Circuit Court
Honorable Lawrence S. Hail, JudgeHARRY ROADEN, - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - - - *Appellee.***OPINION OF THE COURT BY COMMISSIONER
DAVIS—AFFIRMING**

Harry Roaden, manager of Highway-27 Drive-In Theatre, was convicted of exhibiting obscene material in contravention of KRS 436.101(2). His penalty was fixed by the jury at a fine of \$1,000 and confinement in jail for six months. The obscene material was a motion picture entitled "Cindy and Donna." It was conceded by Roaden's counsel in closing argument to the jury that the film is obscene. No issue is presented on appeal as to the obscenity of the material.

The assignments of error are that (1) the film was illegally seized; hence, evidence of its content should have been suppressed; (2) the court erred in permitting a deputy sheriff to have partial custody of the jury when the film was viewed, since the deputy was an interested witness for the prosecution; (3) the trial judge improperly questioned a witness; and (4) the prosecution should have been dismissed, or the judgment should be set aside because of failure of allegation or proof of scienter.

The sheriff of Pulaski County bought a ticket to the theatre and viewed the public showing of "Cindy and Donna." On the premise that the material was obscene, the sheriff proceeded to the projection booth and arrested Roaden, the manager of the theatre. He seized the reels of film incident to the arrest. The appellant contends that the seizure of the film and its subsequent use as evidence violated his constitutional immunity from illegal search and seizure. The appellant's theory is that a prior adversary hearing on the issue of obscenity of the material was required before the film could be seized. In support of that view the appellant relies on such decisions as *Marcus v. Search Warrants*, 367 U. S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708, and *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723. Those decisions relate to seizure of allegedly obscene material for destruction or suppression, not to seizures incident to an arrest for possessing, selling, or exhibiting a specific item. This court dealt with a related question in *Smith v. Commonwealth, Ky.*, 465 S. W. 2d 918, and held that a prior adversary hearing respecting obscenity was not required where the allegedly obscene material was purchased in the usual course of business.

The specific question was treated by a three-judge federal court in *Hosey v. City of Jackson, Mississippi* (SD Miss), 309 F. Supp. 527 (1970).¹ There police officers had viewed the film "Candy" at a public showing, after which they arrested the manager and projectionist of the movie house and seized the film incident to the arrest. In rejecting the same argument which appellant presents, the court said, in part:

¹The Supreme Court has vacated the judgment in *Hosey v. City of Jackson, Mississippi*, in light of the Court's policy of non-interference in state prosecutions, but not on the merits. See 401 U. S. 987, 28 L. Ed. 2d 525, 91 S. Ct. 1221 (1971).

"This court is of the opinion that the seizure of an allegedly obscene film as an incident to lawful arrests for a crime committed in the presence of the arresting officers, i.e., the public showing of such film does not exceed constitutional bounds in the absence of a prior judicial hearing on the question of its obscenity." *Id.* 309 F. Supp. at page 533.

The court elaborated its reasons, noting that the arrest must be legal, the arresting officer must view the film in its entirety and apply the legal guidelines for measuring obscenity, and may seize only the print of the film viewed. In *Perez v. Ledesma*, 401 U. S. 82, 27 L. Ed. 2d 701, 91 S. Ct. 674 (Decided February 23, 1971), the Supreme Court reversed a decision of a three-judge federal court which had held illegal the seizure of material as obscene incident to an arrest without a prior adversary hearing as to its obscenity. The decision was premised upon the court's policy of noninterference with state criminal proceedings prior to adjudication by the state courts. This court is persuaded that the rule followed by the court in *Hosey v. City of Jackson, Mississippi*, *supra*, is the appropriate law. *Lee Art Theatre v. Virginia*, 392 U. S. 636, 20 L. Ed. 2d 1313, 88 S. Ct. 2103, upon which appellant relies, is not dispositive here. In *Lee Art* the film had been seized pursuant to a search warrant, not incident to an arrest. The basis for the holding in *Lee Art* was that there was no valid ground for issuing the search warrant; hence, the ensuing search and seizure were illegal. The reasoning of that decision is not applicable here.

Appellant next complains of the trial judge's ruling in permitting Deputy Sheriff Strunk to be placed in partial charge of the jury as it proceeded to and from a theatre to view the film. The court placed State Trooper King in joint charge of the jury. Deputy Sheriff Strunk had been directed by the sheriff to "keep an eye" on the theatre

managed by appellant and had viewed part of the film and testified in the case. In these circumstances it would have been more appropriate if the trial judge had sustained appellant's objection to allowing Deputy Strunk to accompany the jury. However, in light of the fact that Trooper King was also deputed for the task, when considered with the fact that there was no intimation of any impropriety committed by Deputy Strunk, the court considers the irregularity as harmless. In light of the importance of maintaining the entire judicial process above suspicion, care should be taken to preclude such possible errors in trials. Cf. *Dalby v. Cook*, Ky., 434 S. W. 2d 35, and *Shackelford v. Commonwealth*, 185 Ky. 51, 214 S. W. 788. The incident complained of does not rise to the magnitude of a prejudicial error; hence, it is not ground for reversal. RCr 9.24.

Just after the jury returned to the courtroom after viewing the film, Sheriff Gilmore Phelps was recalled as a prosecution witness. The Commonwealth's Attorney interrogated the sheriff merely to show that the film he had just viewed was recognized by him as the same picture he had seen exhibited publicly. No cross-examination was made, whereupon the following occurred:

"The Court: Let the record show that on the court's own motion the following questions were asked the Sheriff.

Q. 1. Sheriff Phelps you took the films from this courtroom did you not, to the theatre?

A. Yes, sir.

Q. 2. Were they in your custody at all times, from the time you left the theatre until you returned here with them?

A. Yes, sir.

Q. 3. And you have them here with you now?

A. Yes, sir.

Q. 4. And they were in your custody at all times

from the time you left the courtroom going to the Virginia Theatre to have them shown to the jury until you brought them back?

A. Yes, sir.

Q. 5. O.K., that's all."

It is urged by the appellant that the trial judge's intrusion into the case was prejudicial because it had the effect of creating the impression that the trial judge was aiding the prosecution by bringing out something which the Commonwealth's attorney had overlooked. It is also argued that the effect of the trial judge's participation was to create the impression that Sheriff Phelps was meticulous in every detail, thus bolstering him as a faithful servant of the law, eminently worthy of belief by the jury. The difficulty with the argument arises when it is recalled that no question was raised as to the obscenity of the film. Neither was there any issue as to the sheriff's having made the arrest as he had testified. The court is not persuaded that any adverse effect to appellant's rights flowed from the trial judge's actions. The trial judge's questions were competent and pertained to an orderly disposition of the proceedings. No error occurred. *Kelly v. Commonwealth*, Ky., 260 S. W. 2d 953.

Finally, it is urged that there was a fatal omission in the fact that the indictment did not charge scienter, nor did the proof show that appellant had knowledge of the film's content.

The indictment alleged in part that the defendant "did unlawfully and wilfully publish and exhibit, * * * an obscene motion picture entitled 'Cindy and Donna'." The indictment noted KRS 436.101 as its statutory basis. The statute itself requires that the element of scienter be shown. The instructions also required a finding of scienter as a predicate for conviction. The indictment, as drawn, was sufficient to furnish adequate notice of the offense charged.

It met the requirements of RCr 6.10. The trial court properly permitted the Commonwealth to amend the indictment to include scienter, as prescribed by RCr 6.16, since no additional offense was charged and no substantial right of the accused was prejudiced. *Brown v. Commonwealth, Ky.*, 378 S. W. 2d 608; *Fitzgerald v. Commonwealth, Ky.*, 403 S. W. 2d 21.

The appellant testified that he had never personally viewed the film in question. It was shown that the picture was exhibited at the theatre the night before the arrest was made. Appellant was the manager and present when the picture was shown. He said his duties required him to be at various places, so that he did not see the picture show. The jury was not required to believe appellant's testimony. The circumstances warranted a jury's belief that appellant did know the content of the film. It has been held that circumstantial evidence is an appropriate method for proving the purveyor's knowledge of the content of material alleged to be obscene. *Smith v. People of the State of California*, 361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215; *State v. Andrews, Conn.*, 186 A. 2d 546.

The appellant seems to suggest that the Commonwealth was required to prove that appellant was aware that the film was obscene according to statutory and case-law standards. No basis for such a requirement is cited, nor does any suggest itself, particularly in light of appellant's concession that the film is obscene.

The judgment is affirmed.

All concur.

Mandate of the Court of Appeals of Kentucky
(Judgment)

THE COMMONWEALTH OF KENTUCKY

The Court of Appeals
Spring Term—June 25, 1971

HARRY ROADEN,

v.

COMMONWEALTH OF KENTUCKY.

Appeal from a judgment of the Pulaski Circuit Court.

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment is affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

DICK VERMILLION, C.C.A.

By /s/ John C. Scott, D. C.

Issued December 17, 1971.

Appended to the Mandate of the Court of Appeals of Kentucky is a card containing the following notation:

"DEC. 17, 1971

PETITION FOR REHEARING OVERRULED."

Excerpts From Transcript of Proceedings at Petitioner's
Trial, Pulaski Circuit Court, October 20 and 21, 1971

TESTIMONY OF SHERIFF GILMORE PHELPS

Direct Examination by Mr. Harold D. Rogers:

(T. 27)

Q. 65. You may retake the stand, Sheriff, at the time you viewed the motion picture as you have earlier testified on September 29, 1970, did you make a determination as to whether or not the motion picture appealed to the prurient interest?

A. Yes, sir.

Cross Examination by Mr. Phillip K. Wicker:

(T. 31, 32)

Q. 7. Did you have any warrant when you made this arrest and seized this film?

A. No, sir.

Q. 8. Now, I believe you stated that following the showing of the film, you went to the projectionist booth and proceeded to arrest Mr. Roaden and seize the film, is that correct?

A. Yes, sir.

Q. 11. Mr. Phelps, had there been any prior determination before a magistrate or a Judge that this film was obscene?

A. Not to my knowledge.

PULASKI CIRCUIT COURT

Petitioner's Motion to Suppress Evidence
and Dismiss Indictment

(R 6, 7, 8)

Regular October Term

1st day of the term

October 12, 1970

COMMONWEALTH OF KENTUCKY, - - - Plaintiff,

v.

HARRY ROADEN, - - - Defendant.

MOTION TO SUPPRESS EVIDENCE AND DISMISS INDICTMENT # 4432

This day came counsel for defendant and produced and filed Motion to suppress evidence and dismiss indictment herein, which is now noted of record.

/s/ Lawrence S. Hail, Judge
Pulaski Circuit Court.

The Motion to Suppress Evidence and Dismiss Indictment as referred to in the last Order is in words and figures as follows, to-wit:

PULASKI CIRCUIT COURT

Commonwealth of Kentucky - - - Plaintiff

v.

Harry Roaden - - - Defendant

MOTION TO SUPPRESS EVIDENCE AND DISMISS INDICTMENT # 4432

Comes now the defendant by counsel, and moves the Court to suppress the evidence and dismiss indictment No. 4432 returned thereon on the following grounds:

1. That the evidence was improperly, unlawfully and illegally seized, contrary to the procedure provided by Statute and the laws of the land.

2. That without the improperly, unlawfully and illegally seized evidence an indictment would not be returnable, and therefore, should be dismissed.

HARRIS & WICKER

120 North Main Street

Somerset, Kentucky

Attorneys for Defendant

BY: /s/ Phillip K. Wicker

Phillip K. Wicker

NOTICE

TO: Hon. Harold Rogers
Commonwealth's Attorney
28th Judicial District
Somerset, Kentucky

Please take notice that the foregoing Motion to Suppress Evidence and Dismiss Indictment will be brought on for hearing before Hon. Lawrence S. Hail, Judge of the Pulaski Circuit Court, in the Court Room at Somerset, Kentucky, on Friday, October 16, 1970, at 2:00 p.m. or as soon thereafter as the business of the Court will permit. This 12th day of October, 1970.

/s/ Phillip K. Wicker

Counsel for Defendant

CERTIFICATE

I hereby certify that a copy of the foregoing Motion to Suppress Evidence and Dismiss Indictment, together with Notice of Motion, was personally handed to Hon. Harold Rogers, Commonwealth's Attorney, Somerset, Kentucky, on this 12th day of October, 1970.

/s/ Phillip K. Wicker

Counsel for Defendant

Excerpts from Transcript of Proceedings at Petitioner's Trial, Pulaski Circuit Court, Showing Rulings of Trial Court on Motion to Suppress the Evidence

In Chambers (T. 4):

Honorable P. K. Wicker: One thing I can anticipate by watching the trial the outcome of the ruling on the motion to suppress.

The Court: Let it be overruled, unless you want to have something to say.

Honorable Phillip K. Wicker: I don't know of anything else to add, certainly we can't add anything we didn't bring up Friday.

Honorable M. D. Harris: To what we did say. * * *

The Court: Overruled.

TESTIMONY OF SHERIFF GILMORE PHELPS

Direct Examination by Mr. Harold D. Rogers:

(T. 26, 27)

Q. 54. Now you have opened the larger of the two containers and there appears to be three reels of film inside, can you identify those reels?

A. Yes, sir.

Q. 55. What are they?

A. The film of Cindy and Donna.

Q. 56. Is that the same thing that you got that night?

A. Yes, sir.

Q. 57. I believe you have earlier testified that these are in the same condition as the night when you took them, is that correct?

A. Yes, sir.

Q. 58. Will you introduce the three reels?

Honorable P. K. Wicker: Objection, Your Honor, on the same grounds previously stated, we renew our motion to

suppress the films themselves, the Court being advised overruled said objection.

.

Q. 60. Now, will you proceed to the small canister and tell us what if anything is in it?

A. There's two reels, Cindy and Donna and here is my mark I put on it the night I seized them.

Q. 61. Now, will you open that canister, what's in the canister now, Sheriff?

A. Two reels marked 4 and 5 containing the film Cindy and Donna.

Q. 62. Are those reels in the same condition as they were at the time you took them?

A. Yes, sir.

Q. 63. And is the film on both canisters the same?

A. Yes, sir.

Q. 64. Will you introduce the two reels in the small canister as Exhibits 4 and 5 to your testimony and the canister as Exhibit "B" to your testimony?

A. Yes, sir.

Honorable P. K. Wicker: Objection on the grounds as stated before—

The Court: Overruled.

(T. 43)

Q. 2. Sheriff have you just been with the Court and Jury to the Virginia Theatre at a time when a motion picture Cindy and Donna was just shown?

A. Yes, sir.

Q. 3. Did you recognize the motion picture?

A. Yes, sir.

Q. 4. Is it the same movie you earlier testified you saw on the evening of September 29th, 1970 at the Highway 27 Drive-In Theatre on South Highway 27?

A. The same one.

"Statement of the Questions Presented"

Excerpted from Petitioner's Brief Before the Court of Appeals of Kentucky

1. Was the appellant brazenly denied constitutional due process of law when the film was illegally seized by the Sheriff without any prior adversary hearing, and did the circuit court flagrantly commit reversible error in refusing to suppress the illegally seized film as evidence?
4. Did the circuit court commit reversible errors in overruling appellant's motions for a directed verdict, and for dismissal of the indictment, when the Commonwealth had neither alleged nor proved the essential element of scienter?

"Statement of the Questions Presented"

Excerpted from Petitioner's Petition for Rehearing Before the Court of Appeals of Kentucky

1. Was an adversary hearing constitutionally required prior to seizure of the film by the Sheriff so that it was reversible error for the circuit court to refuse to suppress the film as evidence, and did the Court, in holding to the contrary, overlook material facts in the record, overlook controlling decisions, and misconceive the law applicable to this issue?
4. Was the Commonwealth required to prove the elements of Redrup v. New York, and did this Court, in holding to the contrary, overlook material facts in the record, overlook controlling decisions, and misconceive the law applicable to this issue?

PROOF OF SERVICE

I, Phillip K. Wicker, attorney for the Petitioner herein, and a member of the Bar of this Court, hereby certify that on this 4th day of March, 1972, three copies of the Petition

for Writ of Certiorari were mailed first class, postage prepaid, to Ed. W. Hancock, Esq., Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky, 40601, Counsel for the Respondent. I further certify that all parties required to be served have been served.

(s) Phillip K. Wicker

120 North Main Street
Somerset, Kentucky 42501

Attorney for Petitioner

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1971

October Term, 1971

71-1134

HERBERT GOLDMAN

Respondent

COMMONWEALTH OF KENTUCKY

Appellant

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE
COURT OF APPEALS OF KENTUCKY

FILED FOR RESPONDENT IN OPPOSITION

EDWARD HANCOCK
ATTORNEY GENERAL

ROBERT F. WOLKE
ASSISTANT ATTORNEY GENERAL
The Capitol
Frankfort, Kentucky 40601

FILED FOR RESPONDENT

Supreme Court, U. S.
FILED

APR 3 1972

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1971

No. ———, October Term, 1971

71-1134

HARRY ROADEN, ————— PETITIONER

versus

COMMONWEALTH OF KENTUCKY, ——— RESPONDENT

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY**

BRIEF FOR RESPONDENT IN OPPOSITION

**ED W. HANCOCK
ATTORNEY GENERAL**

**ROBERT V. BULLOCK
ASSISTANT ATTORNEY GENERAL
The Capitol
Frankfort, Kentucky 40601**

COUNSEL FOR RESPONDENT

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IN THE

Supreme Court of the United States

No. ———, October Term, 1971

HARRY ROADEN, ----- *Petitioner*

v.

COMMONWEALTH OF KENTUCKY ----- *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled "Harry Roaden v. Commonwealth of Kentucky" and is reported at 473 S.W.2d 814 (1971).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C., Sect. 1257(3).

QUESTIONS PRESENTED

1. IS THERE A SUBSTANTIAL FEDERAL QUESTION PRESENTED FOR REVIEW BY THIS COURT AS A RESULT OF THE SEIZURE OF THE OBSCENE FILM INCIDENTAL TO A LAWFUL ARREST, AND ITS ADMISSION INTO EVIDENCE.

2. WAS THE CLAIM THAT THE PROSECUTION FAILED TO PROVE THE ELEMENTS ENUNCIATED IN **REDRUP V. NEW YORK** PROPERLY RAISED BEFORE THE KENTUCKY COURT OF APPEALS AND IS IT PROPERLY BEFORE THIS COURT.

STATEMENT OF THE CASE

Petitioner is appealing a decision of the Kentucky Court of Appeals which affirmed a judgment of the Pulaski Circuit Court which, after trial by jury, found the Petitioner guilty of violation of Kentucky Revised Statutes Chapter 436, Section 101, and set the punishment at \$1,000 fine and six months in jail. (Transcript of Record, page 15).

This prosecution involved the Kentucky obscenity statute (KRS 436.101), and the showing of an obscene motion picture, entitled "Cindy and Donna." On September 29, 1970, the Sheriff of Pulaski County and the Prosecuting Attorney for that district purchased tickets to the Highway Drive-In Theater, which is located in Pulaski County. (Transcript of Evidence [hereinafter referred to as T.E.] pps. 20, 21; 31). The Sheriff viewed the entire film and proceeded to the projection booth, where he arrested Petitioner on the charge of exhibiting an "obscene" film to the general public. (T.E. 21, 22). As part of the arrest the Sheriff seized the film (T.E. 22, 24), and during the trial the Court overruled a motion by Petitioner to suppress and film as evidence on the ground that it was illegally seized, and admitted the film into evidence. (Transcript of Record page 7 and T.E. p. 4). It should be pointed out that although Petitioner moved to suppress the film as evidence, he did not move the Court for a return of the film. During the course of the trial, the jury was permitted over Petitioner's objection to view the evidence (T.E. pps. 36-41).

As noted by the Kentucky Court of Appeals in its decision in this case (473 S.W.2d 814 at 815):

"It was conceded by Roaden's counsel in closing argu-

ment to the jury that the film is obscene. No issue is presented on the appeal as to the obscenity of the material."

MATTERS AND GROUNDS WHY THIS CASE SHOULD NOT BE REVIEWED BY THIS COURT

I

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED FOR REVIEW BY THIS COURT BY THE SEIZURE OF THE OBSCENE FILM INCIDENTAL TO A LAWFUL ARREST, AND ITS ADMISSION INTO EVIDENCE.

Petitioner made the motion to suppress the evidence and dismiss the indictment because he contended that the evidence was unlawfully seized. This motion was properly overruled. Petitioner's main reliance is upon the U. S. Supreme Court cases of *Marcus v. Search Warrants*, 367 U.S. 717, 6 L.Ed. 2d, 1127, 81 S.Ct. 1708 (1961), and *A Quantity of Copies of Book v. Kansas*, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964). Both of these cases can be distinguished from the present factual situation, since in both instances peace officers in those cases seized large quantities of books pursuant to state statutes which permitted the seizure of allegedly obscene publications and their later destruction. This Court in those two cases held that the seizure of this large quantity of material was unlawful, absent a prior adversary hearing. In the present case, one copy of a film was seized incidental to a lawful arrest for a crime which was committed in the officer's presence.

The First Amendment to the United States Constitution protects freedom of speech in this country. The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Both of these freedoms must be jealously guarded. Neither of these freedoms, however, should be used as a means of frustrating legitimate prosecutions and thereby protection of the general public. Both *A Quantity of*

Books and the *Marcus* cases point out the evil inherent in the wholesale seizure of publications which are alleged to be obscene. In such cases, the possibility exists that legitimate publications might be seized and destroyed as a means of oppressing dissident views. The same reasoning would hold true for the wholesale seizure of motion picture films. In the present case, however, petitioner has not complained that his right to freedom of expression has been interfered with by the seizure of a film which is not obscene, but rather complains that an obscene film which was seized as an incident to an arrest was admitted into evidence. At no time during the proceedings does the record show that petitioner moved for a return of the evidence so that he might continue to show it at the motion picture theater.

The motion by petitioner appears to have been solely for the purpose of suppressing introduction of the movie into evidence. While the rule which prohibits introduction into evidence of material illegally seized is an important guarantee provided by the Fourth Amendment, its purpose is to provide a sanctuary for an individual in his home or habitat. The theory which is the basis for this rule is not present in the instant case in which the evidence was seized within the immediate proximity of the party being arrested in a drive-in theater movie projection booth. (See *Johnson v. Commonwealth*, Ky., 475 S.W. 2d 893 (1971)).

The case of *Lee Art Theater v. Virginia*, 392 U. S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (1968), which was cited by petitioner, is likewise unpersuasive. In the *Lee Arts* case, a film was seized pursuant to a warrant issued solely upon the conclusory affidavit of a police officer, which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard, that the films were obscene. We read the *Lee Arts* case to stand for the principle that the procedure for obtaining a search warrant in that case was defective and not for the proposition that evidence

obtained incident to a lawful arrest cannot be admitted into evidence.

Adoption by this Court of a rule which would require a prior adversary hearing before the arrest and seizure of an obscene film would have the practical effect of opening the door to the showing of hard-core pornography in a theater, while peace officers stand helplessly by awaiting a court ruling. We do not believe that this Court had this in mind in either the *Marcus*, *Quantity of Books* or *Lee Arts* cases. The better rule is that where a peace officer has viewed the film and has reason to believe that it is obscene, makes an arrest, and seizes the evidence coincidentally with the arrest, such material should be admitted into evidence absent a showing that the action of the officer was part of a pattern of harassment or an abridgment of the right of free speech.

In the present case, the obscenity of the movie was not questioned in the trial court. There is no showing that petitioner moved for a return of the film so that he could continue to have it shown in his theater. Obscenity is not protected under the constitutional right to freedom of speech of the First Amendment (*Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498). The seizure of the obscene film was incidental to a lawful arrest. The Constitution of the United States should not be used as an excuse to avoid conviction for the showing of an admittedly obscene film.

It is therefore apparent that the trial court acted properly in denying petitioner's motion to suppress the evidence and dismiss the indictment.

II

THE CLAIM THAT THE PROSECUTION FAILED TO PROVE THE ELEMENTS ENUNCIATED IN REDRUP V. NEW YORK IN THIS PROSECUTION WAS NOT PROPERLY RAISED BEFORE THE

KENTUCKY COURT OF APPEALS AND IS NOT PROPERLY BEFORE THIS COURT

Petitioner moved for a directed verdict in the trial court and cited *Redrup v. State of New York*. (386 U. S. 767, reh. den. 388 U.S. 1924 (1967)). Petitioner's motion was overruled in the trial court.

On appeal to the Kentucky Court of Appeals, petitioner asked that four questions be reviewed. The two questions germane to this petition may be found on page 37 of Petitioner's Petition for Writ of Certiorari, and it can be seen that in neither question presented was a limited concern for juveniles, an invasion of privacy or pandering mentioned. Petitioner's fourth question, which he later alleged to put the *Redrup* case in issue before the Kentucky Court of Appeals, stated:

"4. Did the circuit court commit reversible errors in overruling appellant's motions for a directed verdict, and for dismissal of the indictment, when the Commonwealth had neither alleged nor proved the essential element of *scienter*?" (Emphasis added)

After the case had been decided by the Court of Appeals and upon petition for rehearing, petitioner *then* presented the question:

"4. Was the Commonwealth required to prove the elements of *Redrup v. New York*, and did this Court, in holding to the contrary, overlook material facts in the record, overlook controlling decisions, and misconceive the law applicable to the issue?"

Section 1.210(a) of the Kentucky Rules of the Court of Appeals states:

"The brief of the appellant shall contain the following matter, under the designated main headings, arranged in the following order:

1. A STATEMENT OF THE QUESTIONS PRESENTED, which shall state in the clearest and briefest

form, and separately number, each of the principal questions involved on the appeal. *The Court will not consider, except for special cause, questions not so set forth.*" (Emphasis added)

Section 1.350(b) of the Kentucky Rules of the Court of Appeals states:

"Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on appeal"

The Kentucky Court of Appeals in 1960 held in *Herrick v. Wills, Ky.*, 333 S.W.2d 275, 276:

"The function and scope of a petition for rehearing is set forth in RCA 1.350. Section (b) of that Rule specifically provides that a petition for rehearing shall be limited to a consideration of the issues argued on the appeal"

It is incumbent upon the appellant to present to this Court before submission all of his grounds for reversal. Questions decided by the trial court, but not argued in the briefs, will not be considered by the Court of Appeals

Those to be raised on appeal should be identified separately, and that is one reason why the Points and Authorities required by RCA 1.210 are important. . . ."

Since the Redrup question was not properly brought before the Kentucky Court of Appeals, the Opinion of the Court does not show its consideration, and since the Petition for Rehearing was not the proper action for this consideration under Kentucky Rules of Procedure, the Petition for Rehearing was denied.

It is therefore apparent that this Court should not grant the Petition for Writ of Certiorari requested by petitioner based upon the Redrup decision, since that issue was not properly brought before the Kentucky Court of Appeals. *Beck v. Washington*, 369 U. S. 541, 8 L.Ed.2d 98, 82, S.Ct. 955; *Street v. New York*, 394 U. S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354.

Even if petitioner had properly brought this matter before the Kentucky Court of Appeals, it is contended by respondent that the *Redrup* decision does not mean that the State must allege and prove a limited concern for juveniles, an assault on privacy, or pandering.

The *Redrup* decision can and should be interpreted as meaning that in cases where there is a close question of whether the material is obscene, vel non, the courts may use the tests in *Redrup* in determining that the public must be protected from such material. This Court is not faced with a close question of obscenity, since the question of whether the material was obscene was not questioned in this Petition.

If the prosecution of obscenity cases were limited to the three tests enumerated in the *Redrup* case, the floodgates would be opened to the showing of "hard core stag films" in movie theaters. It is therefore apparent that petitioners' reliance on the *Redrup* decision for certiorari should not be granted.

CONCLUSION

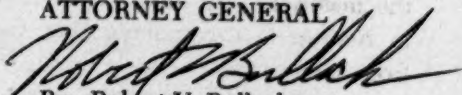
The Kentucky Court of Appeals under the facts in this case properly decided that obscene material which has been seized incidental to a lawful arrest can be admitted into evidence without a prior adversary hearing. There is therefore no substantial federal question on this issue which should be reviewed by this Court.

The issues in *Redrup v. New York*, supra, were not properly brought before the Kentucky Court of Appeals for a decision and therefore should not be subject to review by this Court. Even if *Redrup* were applied, however, the elements listed in *Redrup* should not be used as a means of inhibiting state prosecution in obscenity cases.

For the reasons stated above, it is respectfully contended by the Commonwealth of Kentucky that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

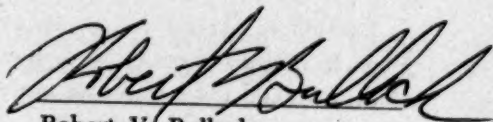


By: Robert V. Bullock
Assistant Attorney General
The Capitol
Frankfort, Kentucky 40601

COUNSEL FOR
RESPONDENT

PROOF OF SERVICE

I, Robert V. Bullock, one of counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 24th day of March, 1972, I served a copy of the Brief for Respondent in Opposition on Phillip K. Wicker, 120 North Main Street, Somerset, Kentucky 42501, Attorney for Petitioner, by mailing a copy in a duly addressed envelope with first class postage prepaid, to said attorney at the above address.



Robert V. Bullock

FILE COPY

**Supreme Court, U. S.
FILED**

MAY 30 1972

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1134

HARRY ROADEN, Petitioner

VERSUS

COMMONWEALTH OF KENTUCKY, . Respondent

ON WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF KENTUCKY

BRIEF FOR THE PETITIONER

**PHILLIP K. WICKER
HARRIS and WICKER**

120 North Main Street
Somerset, Kentucky 42501

Attorneys for Petitioner

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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1134

HARRY ROADEN, - - - - - *Petitioner*

2.

COMMONWEALTH OF KENTUCKY, - Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF KENTUCKY

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals of Kentucky (Petition for Certiorari, pp. 25-30) is reported at 473 S. W. 2d 814. A petition for rehearing was denied without opinion. Petitioner was tried in the Circuit Court of Pulaski County, Kentucky, by a jury and there is no opinion of that Court.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was rendered on June 25, 1971. The mandate (judgment) of the Court of Appeals of Kentucky was entered on December 17, 1971, and a petition for rehear-

ing was denied on the same day. The petition for writ of certiorari was filed on March 6, 1972, and was granted on April 24, 1972. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

United States Constitution, Amendment XIV, Section 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statutes, Chapter 436, Section 101, Subsections (1), (2), (8), and (9):

"436.101 Obscene matter, distribution, penalties, destruction.

(1) As used in this section:"

(a) "Distribute" means to transfer possession of, whether with or without consideration.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matter.

(d) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(2) Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints,

exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than \$1,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars, or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this subsection, he is punishable by fine of not more than \$2,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed \$25,000, or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If a person has been twice convicted of a violation of this section, a violation of this subsection is punishable by imprisonment in the state penitentiary not exceeding five years.

* * * * *

(8) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the..... (title or description of matter) to be obscene," or "We

find the (title or description of matter) not to be obscene," as they may find each item is or is not obscene.

(9) Upon conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the Attorney General, Commonwealth's attorney, county attorney, city attorney or their authorized assistants, or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

QUESTION PRESENTED

In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material, a violation of due process of law?

STATEMENT OF THE CASE

On October 21, 1970, the petitioner was convicted following a jury trial for violation of Kentucky Revised Statutes Chapter 436, Section 101 (A. 2; Petition for Certiorari pp. 23, 24). He was sentenced to pay a fine of \$1,000 and to serve six months in the Pularski County Jail (Petition for Certiorari pp. 23, 24). A timely appeal was taken to the Court of Appeals of Kentucky, and the conviction was affirmed (Petition for Certiorari pp. 25-31).

The events which culminated in the conviction began on the night of September 29, 1970, when the Sheriff

of Pulaski County, Kentucky, purchased a ticket to Highway 27 Drive-In Theatre located south of the City of Somerset, on U. S. Highway 27 in Pulaski County, Kentucky (A. 9, 10, 16). Being exhibited at the theatre that evening was a film entitled "Cindy and Donna" (A. 10). After viewing the entire film, the Sheriff proceeded to the projection booth and there arrested petitioner, the manager of the theatre, upon a charge of exhibiting an "obscene" film to the general public (A. 10, 11). At the same time and place the Sheriff seized the film consisting of five reels in two metal cannisters (A. 10, 13-16).

On the day following the arrest of the petitioner and seizure of the film, the Sheriff appeared before the Grand Jury of Pulaski County, and as a result an indictment was returned charging petitioner with the offense of which he was convicted (A. 3, 4, 11).

Admittedly, the Sheriff had no warrant when he made the arrest and seizure, and there had been no hearing of any kind before a judicial officer to focus on the question of obscenity (A. 17, 19, 20).

On October 3, 1970, the petitioner entered a plea of not guilty, and the case was set for trial in the Pulaski Circuit Court on October 20, 1970 (A. 1, 5). On October 12, 1970, petitioner filed in the Pulaski Circuit Court, a motion to suppress the film as evidence and dismiss the indictment (A. 6, 7). The motion was predicated upon the ground that the film was illegally seized in violation of due process of law because there had been no prior adversary hearing (A. 6, 7). On October 16, 1970, arguments were heard by the Judge

of the Pulaski Circuit Court upon the motion to suppress the film as evidence and dismiss the indictment (A. 7). The motion was overruled by the Judge of the Pulaski Circuit Court on October 20, 1970, the day petitioner's trial began (A. 8).

Upon the trial in Pulaski Circuit Court, the Sheriff and one of his deputies were the only witnesses for the prosecution (A. 8-21). The Sheriff was permitted to give a brief description of the film stating that it revealed the nakedness of the human body and displayed "intimate love scenes" (A. 12). The Sheriff further stated that upon viewing the film, he, on his own, determined that it appealed to prurient interest, such determination on his part leading to the arrest and seizure (A. 15). At no point prior to the seizure did the petitioner or anyone in his behalf have an opportunity to contest the judgment of the local law enforcement officer that the film appealed to prurient interest (A. 17, 19, 20).

During the testimony of the Sheriff the film was introduced in evidence over the objections of the petitioner, and at the time of its introduction petitioner's motion to suppress was renewed and again overruled by the trial judge (A. 14, 15).

The Deputy Sheriff testified that the Sheriff had ordered him to "keep an eye" on the theatre (A. 20). This witness stated that he viewed only the final thirty minutes of the film "Cindy and Donna" from a vantage point on a road outside the theatre (A. 21).

Following the testimony of the Deputy Sheriff, the jury was permitted to view the film at a local indoor theatre (A. 25, 26).

Petitioner testified in his own behalf (A. 30). He stated that no juveniles had been admitted to see the film, and that he had received no complaints about the film until it was seized by the Sheriff (A. 31, 36).

Upon appeal to the Court of Appeals of Kentucky, petitioner urged as reversible error, the denial by the circuit court of his motion to suppress the film as evidence (Petition for Certiorari pp. 25-27). On June 25, 1971, the Court of Appeals of Kentucky rendered its opinion affirming the conviction (Petition for Certiorari pp. 25-30). Rejecting petitioner's arguments concerning the illegality of the seizure, the Kentucky Court held the decisions of this Court in *Marcus v. Search Warrant of Property*, 367 U. S. 717 (1961) and *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964) were not applicable saying: "Those decisions relate to seizure of allegedly obscene material for destruction or suppression, not to seizure incident to an arrest for possessing, selling, or exhibiting a specific item." The Court of Appeals of Kentucky also stated that the decision of this Court in *Lee Art Theatre v. Virginia*, 392 U. S. 636 (1968) "is not applicable here" apparently because in *Lee Art Theatre* ". . . the film had been seized pursuant to a search warrant, not incident to an arrest." (Petition for Certiorari pp. 26, 27).

On December 17, 1971, the Court of Appeals of Kentucky denied a rehearing, and issued its mandate

affirming petitioner's conviction (Petition for Certiorari p. 31). The sentence imposed upon petitioner has not yet been executed.

SUMMARY OF ARGUMENT

The action of the Sheriff of Pulaski County, Kentucky, in seizing this film upon his own determination of its obscenity without any warrant, without any prior adversary hearings, and without any prior judicial scrutiny at all clearly abridged rights guaranteed to petitioner against state action by the First and Fourth Amendments through the Fourteenth Amendment of the Constitution of the United States of America. The decision of the Court of Appeals of Kentucky that the seizure was proper rests in direct contravention of clear pronouncements of this Court that an adversary hearing must precede the seizure of allegedly obscene material. *Marcus v. Search Warrants of Property*, 367 U. S. 717 (1961); *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964).

A seizure of materials alleged to be obscene is subjected to much more stringent scrutiny under the Constitution than a seizure of ordinary contraband such as drugs or gambling equipment. In such instances because the right of freedom of expression is involved the procedures to which the accused is entitled are much more complicated. Because it imports danger of abridgment of the right of the public to unobstructed circulation of nonobscene matter, and to the end that the accused is not deprived of due process, a law enforcement officer cannot take it upon himself to deter-

mine that book or film is obscene and proceed to seize it. There must be a prior adversary proceeding.

The Court of Appeals of Kentucky in its Opinion attempted to distinguish the *Marcus* and *Books* decisions on the grounds that those cases related to massive seizures of large quantities of materials for destruction or suppression, as opposed to seizures incident to an arrest for an alleged crime committed in the presence of the arresting officer (Petition for Certiorari p. 26). There is no logical basis for such a distinction because there can be no difference in due process requirements between the seizure of a large number of books and the seizure of the single print of a motion picture film. Preventing a large group in the community from access to a film cannot be distinguished in the light of first amendment rights from preventing a similarly large number of books from being circulated. Moreover, determination by law enforcement officers of the status of films whether obscene or not is not enough protection to the owner to constitute due process. It is incongruous to condemn as vesting too abundant discretion in the enforcing officer, a search and seizure made on an overly broad warrant while at the same time permitting officers an unfettered discretion in seizure effected without a warrant under the guise of being incident to arrest. In both circumstances constitutionally compelled procedural safeguards are lacking. Therefore, there is no merit in distinguishing this case from *Books* and *Marcus* as the Kentucky Court of Appeals has done on the basis that the seizure in this case took place incident to arrest.

In *Mapp v. Ohio*, 367 U. S. 643 (1961) it was established that material seized by *state* officers in violation of the Due Process Clause of the Fourteenth Amendment is not admissible as evidence in a *state* court. Motion pictures are protected by the First and Fourteenth Amendments from state action that would abridge freedom of expression. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952). Since a violation of the First and Fourteenth Amendments infected the proceedings, petitioner was entitled to have the film suppressed as evidence upon making timely motion before the trial for such suppression. As in *Lee Art Theatre v. Virginia*, 392 U. S. 636 (1968), admission of the illegally seized film in evidence in this case, requires reversal of petitioner's conviction.

Borderline speech must be protected by the application of elaborate procedures prior to suppression via seizure. Such procedures are impossible to follow in a seizure incident to arrest such as occurred in this case. Only a tenacious adherence to such procedures assures a free society that the sensitive determination of obscenity will be made judicially and not ad hoc by police officers in the field. Here, no prior procedures whatsoever were followed. The petitioner has been denied due process of law as a result of the illegal seizure of the film and erroneous admission of it in evidence.

In order to vindicate petitioner's rights and redress the flagrant violation of due process of law which has been sanctioned by the Kentucky Court of Appeals, the judgment of the Kentucky Court of Appeals should be reversed.

ARGUMENT

The Denial of an Adversary Hearing Prior to Seizure of the Film in This Case is Inconsistent With the Decisions of This Court, and Amounts to a Flagrant Violation of Due Process of Law.

The decision of the Court of Appeals of Kentucky would permit local law enforcement officers an unfettered discretion to seize material alleged by them to be obscene without any legal safeguards or notice requirements whatsoever. The liberty of every citizen is thus placed in the hands of every peace officer with no opportunity on the part of the defendant to counter the judgment of the officer that the material seized is obscene. But the guarantee of a right to free speech and press makes any seizure of allegedly obscene expression a unique constitutional issue. This Court has held that a State is not free to adopt whatever procedures it pleases for dealing with obscenity, without regard to the possible consequences for constitutionally protected speech; that the line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn; and that the separation of legitimate from illegitimate speech calls for sensitive tools. *Marcus v. Search Warrants of Property*, 367 U. S. 717 (1961); *Speiser v. Randall*, 357 U. S. 513 (1958).

Here, the action of the Sheriff of Pulaski County, Kentucky, in seizing this film upon his own determination of its obscenity without any warrant, without any prior adversary hearing, and without any prior ju-

dicial scrutiny at all clearly abridged rights guaranteed to petitioner against state action by the First and Fourth Amendments through the Fourteenth Amendment of the Constitution of the United States of America. The decision of the Court of Appeals of Kentucky that the seizure was proper rests in direct contravention of clear pronouncements of this Court that an adversary hearing must precede the seizure of allegedly obscene materials. Thus in *Marcus v. Search Warrants of Property*, *supra*, this Court said:

"We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complaints to be obscene."

Moreover:

". . . discretion to seize allegedly obscene materials cannot be confided to law enforcement officers without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantee."

Before concluding the opinion in the Marcus case, the Court noted "there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." A state may not impose the "... extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity irrespective of whether or not the material is legally obscene." Thus the Marcus decision seems to establish beyond controversy that an adversary proceeding on the issue of obscenity is an essential prerequisite to seizure even if the material is obscene.

Even if a judicial injury precedes the seizure, it is still not enough to satisfy "Due Process" requirements for protection of free expression. Thus in *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964), an *ex parte* inquiry by a judge prior to issuance of a warrant directing the seizure of a stack of paperback novels was held to be constitutionally deficient. This Court said:

"For if seizure of books precedes an adversary determination of their obscenity, there is danger of the right of the public in a free society to unobstructed circulation of non-obscene books."

And further:

"Here, as in *Marcus*, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellant's constitutional rights' 367 U. S. at 738, 6 L. Ed. 2d at 1140, the judgment resting on a finding of obscenity must be reversed."

In both *Marcus* and *Books* this Court recognized that a seizure of materials alleged to be obscene is subject to much more stringent scrutiny under the Constitution than a seizure of ordinary contraband such as drugs or gambling equipment. As stated in *Books*:

"It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We reject that proposition in *Marcus*."

In such instances because the right of freedom of expression is involved the constitutional procedures to which the accused is entitled, are much more complicated. To the end that the accused is not deprived of Due Process, a law enforcement officer cannot take it upon himself to determine that a book or film is obscene and proceed to seize it. Such is the teaching of the *Marcus* and *Books* cases.

But the Court of Appeals of Kentucky in its Opinion says that the *Marcus* and *Books* decisions "relate to seizure of allegedly obscene material for destruction or suppression, not to seizure incident to an arrest for possessing, selling, or exhibiting a specific item" (Petition for Certiorari, p. 26). Those decisions are thus distinguished by the Kentucky Court on the basis that the seizures in *Books* and *Marcus* were massive, and also on the ground that the seizure of this film was incidental to arrest for a crime committed in the presence

of the arresting officer. Such distinctions are completely without logical basis. In *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2d Cir. 1969), cert. den. 397 U. S. 920 (1969), it was recognized that "a motion picture like a book, is entitled to the protection of the first amendment. That protection includes the requirement that an adversary hearing be provided before the allegedly obscene works can be seized." The Court in *Bethview* went on to point out that there can be no difference in due process requirements between the seizure of a large number of books and the seizure of the single print of a motion picture film:

"We are told that the Bethview Theatre has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4,000 individuals would see the film. Preventing so large a group in the community from access to a film is no different in the light of first amendment rights from preventing a similarly large number of books from being circulated."

On this same reasoning the distinction made by the Kentucky Court of Appeals between this case and the *Marcus* and *Books* cases is completely illogical. In *Cambist Films, Inc. v. Tribell* (E.D. Ky.) 293 F. Supp. 407 (1968) a three-judge Federal District Court sitting in Kentucky said:

"Because the line between protected, and unprotected speech, under the First Amendment, is so difficult to draw, and because First Amendment rights are of such fundamental importance to our

system of government, the Constitution requires a procedure 'designed to focus searchingly on the question of obscenity' before speech can be regulated or suppressed. (Citation omitted) The dissemination of a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing."

Furthermore:

"Although *A Quantity of Books*, *supra*, involved a search and seizure in a civil forfeiture case, the principles there announced apply as well to a search and seizure for the purpose of gathering evidence for a criminal obscenity prosecution."

Thus distinction of this case from the principles of *Marcus* and *Books* on the basis that the latter involved massive seizure of large quantities of allegedly obscene items in civil forfeiture proceedings as opposed to the seizure of a single print of a film in this case is simply not warranted.

In *Cambist Films, Inc. v. Duggan*, 420 F. 2d 687 (3rd Cir. 1969) the United States Court of Appeals, Third Circuit, rejected the notion that the seizure of the film in that case was lawful if made incident to a lawful arrest without a warrant for a crime committed in the presence of the arresting officer, saying:

"We cannot agree with the basic premise of the district court that police officers may, after viewing a motion picture themselves, determine whether

it is obscene, and if they determine it to be obscene, proceed to arrest the exhibitor and seize the film without a warrant. On the contrary, it is now settled that the First and Fourteenth Amendments to the Constitution require that there be an adversary judicial hearing and determination of obscenity before a warrant may be issued to search and seize alleged obscene materials. *Marcus v. Search Warrants*, 1961, 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127; *A Quantity of Copies of Books v. State of Kansas*, 1964, 378 U. S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809. Such a hearing and determination is *a fortiori* required where officers, as in this case, seize without a search warrant materials alleged by them to be obscene. For such a non-judicial *ex-parte* determination does not afford the owner due process of law."

The same view of this question has been expressed by a number of other United States Courts of Appeals in the following cases: *Astro Cinema Corp. v. Mackell*, 422 F. 2d 293 (2d Cir. 1970); *Demich, Inc. v. Ferdon*, 426 F. 2d 643 (9th Cir. 1970) reversed on other grounds 28 L. Ed. 2d 528 (1971); *Metzger v. Pearcey*, 393 F. 2d 202 (7th Cir. 1968); *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969) cert. den., 396 U. S. 985 (1969). The decisions of the great majority of United States District Courts which have considered the question are in accord. *Grove Press, Inc. v. Flask* (N.D. Ohio E.D.) 326 F. Supp. 574 (1970), (three judge court); *Carroll v. City of Orlando* (M.D. Fla.) 311 F. Supp. 967 (1970), (three judge court with opinion citing 24 cases in accord and noting only 3 to the contrary);

Platt Amusement Arcade v. Joyce (W.D. Penn) 316 F. Supp. 298 (1970); United Artists, Theatre Circuit, Inc. v. Thompson (W.D. Ark.), 316 F. Supp. 815 (1970); and Bongiovanni v. Hogan (S.D.N.Y.) 309 F. Supp. 1364 (1970). A number of state courts have recognized the proposition. State v. Parisi, 76 N. J. Super, 115, 183 A. 2d 801 (1962); Stentel v. Smith, 18 A.D. 2d 458, 240 N.Y.S. 2d 200 (1963); and Flack v. Municipal Court for Anaheim-Fullerton, 66 Cal. 2d 981, 429 P. 2d 192 (1967). These authorities attest there is no merit in distinguishing the instant case from the *Marcus* and *Books* cases as the Kentucky Court of Appeals has done on the basis that the seizure which took place here was incident to an arrest. These authorities attest there is no valid reason for not applying the rationale of *Marcus* and *Books* to the instant case. While in the ordinary case a search incident to an arrest is not unreasonable if the arrest is lawful, the First Amendment compels more restrictive rules in cases in which the arrest and search relate to alleged obscenity. Determination by law enforcement officers of the status of films whether obscene or not is not enough protection to the owner to constitute due process. It is incongruous to condemn as vesting too abundant discretion in the enforcing officer, a search and seizure made on an overly broad warrant while at the same time permitting officers an unfettered discretion in seizures effected without a warrant under the guise of being incident to arrest. In both circumstances constitutionally compelled procedural safeguards are lacking. This incongruity is apparent in

the proclamation by the Kentucky Court of Appeals that *Lee Art Theatre v. Virginia*, 392 U. S. 636 (1968) "is not applicable here." The Court of Appeals of Kentucky erred most flagrantly and sanctioned a monumental violation of Due Process of Law in concluding that an adversary hearing was not required before seizure of the film in question.

The requirement of an adversary hearing prior to seizure of material alleged to be obscene is an ingredient of that broader and more fundamental "due process" precept that an individual is guaranteed a right to notice and hearing before he may be deprived of life, liberty or property. Citizens of the United States are entitled to a "meaningful opportunity to be heard" as part of the Due Process guarantee. Such is not only true in matters involving obscenity, but in many other areas.

Thus in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969) the Wisconsin prejudgment garnishment procedure was held violative of the fundamental principles of due process because of the absence of notice and prior hearing to the garnishee. In *Goldberg v. Kelly*, 397 U. S. 254 (1970), the Court held that procedural due process required that a welfare recipient be afforded an opportunity to be heard before his welfare payments could be terminated. Justice Brennan writing for the Court, noted that a crucial factor in the context of the case was that termination of said pending resolution of a controversy over eligibility "may deprive an *eligible* recipient of the very means by which to live while he waits. . . ."

"In the present context these (due process) principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witness and by presenting his own arguments and evidence orally."

In *Boddie v. Connecticut*, 401 U. S. 371 (1971), the Court held that due process of law prohibited a State from denying indigents access to the courts solely because of inability to pay court fees and costs in divorce actions. In the course of the opinion, Justice Harlan held that "a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."

Other recent decisions have continued this far reaching trend. *Wisconsin v. Constantineau*, 400 U. S. 433 (state statute authorizing the posting in liquor outlets of a notice prohibiting the sale of liquor to specified individuals, without notice or hearing prior to posting, held unconstitutional as amounting to denial of procedural due process); *Hall v. Garson*, 403 F. 2d 430 (5th Cir. 1970) (Texas statute giving landlord a lien on personal goods of tenants and authorizing landlord to enforce that lien by peremptory seizure of the property raised due process issue under the Constitution); and *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970), (Distress sales under distraint procedure of Pennsylvania Landlord and Tenant Act amounted to a taking of property without procedural due process

since sales did not follow a hearing of some sort before the tenant was deprived of his property).

But much more than private interest in property is affected by governmental action when suppression of any medium of communication is involved. In such case the public's right to know, the public's right to hear, the public's right to view is also in balance. The stakes are higher in a self-governing society when the exercise of freedoms of speech and press are affected. And it thus follows that a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963); and *Freedman v. Maryland*, 380 U. S. 51 (1965).

And so with respect to the *ex parte* seizure and suppression of films, books, magazines and other media of communication, the Court's rulings, and the decisions of the lower courts which followed have been undeviating. The fundamental postulant of the decisions has been that the seizure and suppression of expression without a prior adversary hearing to determine the alleged obscenity of the particular communication seized constitutes a prior restraint on the exercise of freedoms of speech and press in violation of the First, Fourth, and Fourteenth Amendments. This is reasonable because an adversary hearing achieves accurate factual and legal determinations; it facilitates close judicial scrutiny of the material; it assures attention to the relevant legal principles; and it makes certain that seizure or injunction will be limited only to these

items found to be obscene. The adversary proceeding thus avoids seizure and suppression of non-obscene material; minimizes the financial burdens of a seizure from a person's business; and of course insures the public's right to unobstructed viewing and reading of constitutionally protected matter.

There does not appear to be any overriding considerations which would justify the denial of a prior adversary hearing in a case involving the seizure of a motion picture film exhibited to the general public. The seizure of material in connection with the investigation of alleged violations of an obscenity law should not obviate the need for a prior adversary hearing. The decisions of the courts have shown that there are ample means available to a prosecution to assure that evidence will be available in the event of the institution of criminal proceedings. As stated in *United States v. Alexander*, 428 F. 2d 1169 (8th Cir. 1970):

"It is frequently suggested and the Government so argues, that dealers in obscenity will be effectively immunized from prosecution if a prior adversary hearing is required in cases such as this. Several courts have faced this contention, and have demonstrated that a number of methods for securing the evidence remain available to the prosecutors. (Citations omitted) We believe these cases answer the government's concern."

And as stated in *Bongiovanni v. Hogan*, *supra*:

"Moreover, seizure is not the exclusive method for initiating an obscenity prosecution and the state

may avoid the problems of a preliminary adversary hearing by seeking some other constitutionally permissible route."

It is most earnestly submitted that an adversary hearing prior to seizure or suppression of materials alleged to be obscene is a vital necessity for assuring that neither the public nor the exhibitor will be deprived of a motion picture film which is entitled to constitutional protection under the First Amendment. A prior adversary hearing is that "sensitive tool" which insures the separation of legitimate from illegitimate speech and press.

In this case since no adversary hearing was afforded to petitioner prior to the seizure by the Sheriff of Pulaski County, Kentucky, of the film "Cindy and Donna" the seizure was unreasonable, improper, and illegal. It is elementary therefore, that the fruits of this illegal seizure should not have been available to the prosecution upon the trial, and that the film should have been suppressed as evidence upon petitioner's timely motion. But again the Court of Appeals of Kentucky, in utter defiance of clear decisions of this Court, ignored this basic principle of Constitutional law. In *Mapp v. Ohio*, 367 U. S. 643 (1961) it was established that material seized by *state* officers in violation of the Due Process Clause of the Fourteenth Amendment is not admissible as evidence in a *state* court. Through the Due Process Clause of the Fourteenth Amendment both the First Amendment protection of free speech and the Fourth Amendment protection against un-

reasonable searches and seizures are restrictions upon the states. *Gitlow v. New York*, 268 U. S. 652 (1925); *Ker v. California*, 374 U. S. 23 (1963). Motion pictures are protected by the First and Fourteenth Amendments from state action that would abridge freedom of expression. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. (1952). *Lee Art Theatre v. Virginia*, *supra*, conclusively supports petitioner's position because it says that admission in evidence of a film seized in violation of the Fourteenth Amendment requires a reversal of the conviction. There this Court reversed the conviction of a motion picture operator charged with showing obscene pictures in violation of Virginia Statutes. There, seizure of the films was carried out on the basis of an affidavit of a police officer which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard in front of the theatre, that the films were obscene. This Court said:

"The admission of the films in evidence requires reversal of petitioner's conviction. A seizure of allegedly obscene books on the authority of a warrant 'issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered obscene' was held to be an unconstitutional seizure in *Marcus v. Search Warrant*, 367 U. S. 717, 731-732, 6 L. Ed. 2d 1127, 1135, 1136, 81 S. St. 1708. It is true that a judge may read a copy of a book in a courtroom or chambers but not as easily arrange to see this case whether the justice of the peace should have viewed the motion picture be-

fore issuing the warrant. The procedure under which the warrant issued solely upon the conclusionary assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity', *id.* at 732, 6 L. Ed. 2d 1136, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See *Freedman v. Maryland*, 380 U. S. 51, 58-59, 13 L. Ed. 2d 649, 654, 655, 85 S. Ct. 734. "The judgment of the Supreme Court of Appeals of Virginia is reversed and the case is remanded for further proceedings not inconsistent with this opinion."

Lee Art Theatre conclusively illustrates that when a motion picture is illegally seized in violation of Due Process requirements, it is not admissible in evidence, and a conviction based upon it will not be permitted to stand. In this case no prior procedures whatsoever were followed. Upon the authority of *Lee Art Theatre* and the other decisions of this Court herein referred to, admission in this case of the illegally seized film requires reversal of petitioner's conviction.

Borderline speech must be protected by the application of elaborate procedures prior to suppression via seizure. Such procedures are impossible to follow in a seizure incident to arrest such as occurred in this case. Only a tenacious adherence to such procedures assures a free society that the sensitive determination of obscenity will be made judicially and not *ad hoc* by police officers in the field. By reason of the trampling

of petitioner's basic rights and because a violation of the Fourteenth Amendment infected the proceedings, it is most earnestly submitted that the judgment of the Court of Appeals of Kentucky should be reversed.

CONCLUSION

For the reasons herein stated the judgment of the Court of Appeals of Kentucky should be reversed and the conviction of the petitioner set aside.

Respectfully submitted,

PHILLIP K. WICKER

120 North Main Street
Somerset, Kentucky 42501

Attorney for Petitioner

PROOF OF SERVICE

I, Phillip K. Wicker, attorney for the Petitioner herein, and a member of the Bar of this Court, hereby certify that on this 27th day of May, 1972, three copies of the Brief For The Petitioner were mailed first class, postage prepaid, to Hon. Robert V. Bullock, Esq, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky, 40601, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Phillip K. Wicker

Phillip K. Wicker
120 North Main Street
Somerset, Kentucky 42501
Attorney for Petitioner

EX COPY

Supreme Court, U. S.
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MICHAEL BODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1134

HARRY ROADEN, ----- PETITIONER

versus

COMMONWEALTH OF KENTUCKY, ----- RESPONDENT

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE RESPONDENT

ED W. HANCOCK
ATTORNEY GENERAL

ROBERT V. BULLOCK
ASSISTANT ATTORNEY GENERAL
The Capitol
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

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100	U.S. v. [illegible] 2049
101	U.S. v. [illegible] 2050

IN THE
Supreme Court of the United States

No. 71-1134, October Term, 1971

HARRY ROADEN, ----- *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, ----- *Respondent*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled "Harry Roaden v. Commonwealth of Kentucky" and is reported at 473 S.W.2d 814 (1971).

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C., Sect. 1257(3).

QUESTION PRESENTED

IN THE ABSENCE OF A PRIOR ADVERSARY HEARING, IS THE SEIZURE, INCIDENT TO AN ARREST, OF ALLEGEDLY OBSCENE MATERIAL A VIOLATION OF DUE PROCESS OF LAW?

STATEMENT OF THE CASE

Petitioner is appealing a decision of the Kentucky Court of Appeals which affirmed a judgment of the Pulaski Circuit Court which, after trial by jury, found the Petitioner guilty of violation of Kentucky Revised Statutes Chapter 436, Section 101, and set the punishment at \$1,000 fine and six months in jail.

This prosecution involved the Kentucky obscenity statute (KRS 436.101), and the showing of an obscene motion picture, entitled "Cindy and Donna." On September 29, 1970, the Sheriff of Pulaski County and the Prosecuting Attorney for that district purchased tickets to the Highway Drive-In Theater, which is located in Pulaski County. (A-8, 9, 10; 16, 17) The Sheriff viewed the entire film and proceeded to the projection booth, where he arrested Petitioner on the charge of exhibiting an "obscene" film to the general public. (A-9, 10, 11) As part of the arrest the Sheriff seized the film (A-10, 11; A-12, 13), and during the trial the Court overruled a motion by Petitioner to suppress the film as evidence on the ground that it was illegally seized, and admitted the film into evidence. (A-6, 7; and A-8) It should be pointed out that although Petitioner moved to suppress the film as evidence, he did not move the Court for a return of the film. During the course of the trial, the jury was permitted over Petitioner's objection to view the evidence. (A-21, 22; A-25, 26)

As noted by the Kentucky Court of Appeals in its decision in this case (473 S.W.2d 814 at 815):

"It was conceded by Roaden's counsel in closing argument to the jury that the film is obscene. No issue is presented on the appeal as to the obscenity of the material."

SUMMARY OF ARGUMENT

It is a well-settled principle of law that, generally, evidence seized incidental to a lawful arrest can be used in a criminal prosecution. Petitioner argues that *Marcus v. Search Warrants*,

387 U.S. 717 (1961) and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964) require that a prior adversary hearing be held before there is a seizure of obscene material. Both *Marcus* and *Quantity* can be distinguished from the present case, since in both of those instances large quantities of printed material were seized for the purpose of destruction, whereas in the present case one copy of a film was seized incidental to a lawful arrest for admission into evidence.

There is no showing of a pattern of harassment by officials of the Commonwealth concerning Petitioner, and Petitioner at no time asked for a return of the film that was seized so that he might later continue to show it at his theater. It could therefore be assumed that Petitioner's concern is not so much for his First Amendment rights to freedom of speech, but rather he is more concerned that the evidence which was seized was used against him in the criminal prosecution. The framers of the Constitution did not anticipate the Constitution being used as a means of thwarting legitimate prosecutions and this Court should not construe the Constitution in such a manner so as to frustrate legitimate prosecutions. It should be pointed out that counsel for Petitioner admitted in closing argument that the film was obscene and that therefore there is no real question concerning First Amendment rights, since an admittedly obscene film does not fall within the right to freedom of speech, *Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

If this Court were to decide that a prior adversary hearing is necessary prior to seizure of obscene films, such a decision would have the practical effect of eliminating or severely restricting criminal prosecutions for the showing of obscene films. It is a well-recognized fact that films can be altered and changed, and that they are usually transported from one area to another for showing with rapid regularity. Since this Court has stated that the test for obscenity is, taking the material as a whole, determining that it appeals to the prurient interest and that it

is utterly without redeeming social value, it is obvious that a copy of the film shown at the commission of the crime is absolutely necessary for prosecution under obscenity statutes. Requirement of a prior adversary hearing is unworkable and would create an unbalanced state of affairs which would promote a disrespect for law and order, since the public might observe individuals openly displaying obscenity while enforcement officers are unable to take quick, effective action.

There is no showing in the present case that the Commonwealth of Kentucky acted in bad faith, but rather the evidence shows that extreme care was taken to insure Petitioner of a speedy review and that within hours after the arrest and seizure, the Grand Jury after reviewing the evidence returned an indictment. It should also be pointed out that in this instance the Commonwealth Attorney, who is that district's chief prosecuting attorney, was present with the Sheriff and would have had the opportunity to advise him of probable cause at the time of the seizure. The Commonwealth therefore exhibited its intent to prosecute an obscene film and the action of the Sheriff and the Commonwealth of Kentucky is in keeping with the rights of the Petitioner as granted by the Constitution, while at the same time protecting the people of Kentucky from obscenity.

It is therefore respectfully requested that the decision of the Kentucky Court of Appeals in this matter be upheld.

ARGUMENT

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE SEIZURE OF THE OBSCENE FILM INCIDENTAL TO A LAWFUL ARREST AND THE ADMISSION OF THE FILM INTO EVIDENCE.

A. The Film Was Seized For Use As Evidence

Petitioner made the motion to suppress the evidence and dismiss the indictment because he contended that the evidence

was unlawfully seized. This motion was properly overruled. Petitioner's main reliance is upon the U. S. Supreme Court cases of *Marcus v. Search Warrants*, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (1961), and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964). Both of these cases can be distinguished from the present factual situation, since in both instances peace officers in those cases seized large quantities of books pursuant to state statutes which permitted the seizure of allegedly obscene publications and their later destruction. This Court held that the seizure of this large quantity of material was unlawful, absent a prior adversary hearing. In the present case, one copy of a film was seized incidental to a lawful arrest for a crime which was committed in the officer's presence.

The Court in *Bazzell v. Gibbens*, 306 F.Supp. 1057, 1059, (E.D. La. 1959), in which a motion picture film was seized with a warrant coincidental to a lawful arrest, reasoned clearly when it stated:

"... We have for decision only the narrow question of whether or not the Constitution of the United States compels, in all cases, an adversary hearing on the question of obscenity prior to seizure of the thing alleged by the State to be obscene. We answer that question in the negative"

. . . .

I find nothing in the case law to indicate that in every case where seizure of alleged obscene material is to be made, a pre-seizure adversary hearing is constitutionally required. Whether or not such a hearing is required must depend upon the nature and purpose of the seizure. If the seizure is made for the purpose of destroying the thing seized and for the purpose of preventing the dissemination of the material involved, then *A Quantity of Books* teaches that an adversary hearing prior to the seizures and/or destruction of the material is required in order not to run (sic) afoul of the First Amendment guarantee to the right of freedom of ex-

pression. But where, as here, a single copy of a film is seized for the sole purpose of preserving it as evidence to be used in a criminal action to be brought pursuant to a State statute . . . such a seizure cannot be said to be violative of the First Amendment's guarantees albeit a side effect of such a seizure coincidentally prevents that one particular copy of the film from being further disseminated pending the outcome of the criminal proceedings

.

. . . [T]he purpose of the possession of the film by the State is to preserve the minimum amount of evidence required to properly prepare the State's case rather than to prohibit the further dissemination of the information contained in the film prior to trial"

See also *Scott v. Frey*, 330 F.Supp 365 (1971))

The First Amendment to the United States Constitution protects freedom of speech in this country. The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Both of these freedoms must be jealously guarded. Neither of these freedoms, however, should be used as a means of frustrating legitimate prosecutions and the protection of the general public. Both *A Quantity of Books* and the *Marcus* cases point out the evil inherent in the whole-sale seizure of publications which are alleged to be obscene. In such cases, the possibility exists that legitimate publications might be seized and destroyed as a means of oppressing dissident views. The same reasoning would hold true for the whole-sale seizure of motion picture films. In the present case, however, Petitioner has not complained that his right to freedom of expression has been interfered with by the seizure of a film which is not obscene, but rather complains that an obscene film which was seized as an incident to an arrest was admitted into evidence. At no time during the proceedings does the record show that petitioner moved for a return of the evidence so that he might continue to show it at the motion picture theater.

Therefore, it may be assumed that Petitioner is not so concerned about his First Amendment rights as he is about avoiding prosecution for his crime.

As noted by the Second Circuit Court of Appeals in *U. S. v. Cangiano*, _____ F.2d _____, decided June 26, 1972, in which there was a seizure of allegedly obscene material incidental to an arrest,

"... [E]ven assuming that there was an undue infringement of First Amendment rights, we reject appellant's contention that this infringement required the suppression of the material seized at the subsequent obscenity prosecution

... However, where seizure of allegedly obscene materials is not preceded by a procedure which affords a reasonable likelihood that non-obscene materials will reach the public, the proper remedy is the return of the allegedly obscene materials to those from whom they were seized, not suppression of these items at a subsequent obscenity trial"

The Court in *Cangiano* noted in a footnote that at no time had the appellants requested the return of the material seized and even if they had it would have been permissible for the government to retain a few samples of the material for use as evidence. (See also *State v. Albini*, 31 Ohio St.2d 27, (decided July 5, 1972)).

The motion by Petitioner appears to have been solely for the purpose of suppressing introduction of the movie into evidence. While the rule which prohibits introduction into evidence of material illegally seized is an important guarantee provided by the Fourth Amendment, its purpose is to provide a sanctuary for an individual in his home or habitat. The theory which is the basis for this rule is not present in the instant case in which the evidence was seized within the immediate proximity of the party being arrested in a drive-in theater movie projection booth. (See *Johnson v. Commonwealth*, Ky., 475 S.W.2d 893 (1971)).

The case of *Lee Arts Theater v. Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (1968), which was cited by Petitioner, is likewise unpersuasive. In the *Lee Arts* case, a film was seized pursuant to a warrant issued solely upon the conclusory affidavit of a police officer, which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard that the films were obscene. We read the *Lee Arts* case to stand for the principle that the procedure for obtaining a search warrant in that case was defective and not for the proposition that evidence obtained incident to a lawful arrest cannot be admitted into evidence.

Adoption by this Court of a rule which would require a prior adversary hearing before an arrest and the seizure of an obscene film would have the practical effect of opening the door to the showing of hard-core pornography in a theater, while peace officers stand helplessly by awaiting a court ruling. We do not believe that this Court had this in mind in either the *Marcus*, *Quantity of Books* or *Lee Arts* cases. The better rule is that where a peace officer has viewed the film and has reason to believe that it is obscene, makes an arrest, and seizes the evidence coincidentally with the arrest, such material should be admitted into evidence absent a showing that the action of the officer was part of a pattern of harassment or an abridgment of the right of free speech.

In the present case, the obscenity of the movie was not questioned. There is no showing that Petitioner moved for a return of the film so that he could continue to have it shown in his theater. Obscenity is not protected under the constitutional right to freedom of speech of the First Amendment (*Roth v. U.S.*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)). The seizure of the obscene film was incidental to a lawful arrest. The Constitution of the United States should not be used as an excuse to avoid conviction for the showing of an admittedly obscene film.

- B. Requiring an Adversary Hearing Prior to Seizure of Obscene Films Would Have the Practical Effect of Severely Restricting or Eliminating Such Criminal Prosecutions for the Showing of Obscene Films.

This Court has stated in *Roth v. U.S.*, *supra*, that obscenity is not protected under the constitutional right to freedom of speech and has therefore indicated its approval of criminal prosecutions in obscenity cases. (See also *U.S. v. Reidel*, 402 U.S. 351 (1971)). Petitioner would argue that, while obscenity is not protected by the First Amendment to the Constitution, this Court should place in the way of prosecutors insurmountable roadblocks which would have the practical effect of stopping enforcement of laws prohibiting obscenity which this Court has indicated is within the reasonable powers of the state to enforce.

Although this Court has recognized the difference between obscene books and obscene films in the *Lee Arts* case, *supra*, the full import and practical effect of these differences has not been explored fully. It is well known that films are moved from theater to theater with rapid regularity, whereas printed material often stays on the shelves of the bookstore for an appreciable period of time. Because of the fugitive nature of films as opposed to books, this Court should state the rule that, when a peace officer has viewed a film and determined its obscenity, the film can be admitted into evidence if it was seized incidental to the lawful arrest. Although apparently vacated for other grounds by this Court (401 U.S. 987), the reasoning of the U.S. District Court for the Southern District of Mississippi in *Hosey v. the City of Jackson*, Miss., 309 F.Supp. 527 (1970) seems applicable here. There, a film was seized incidental to a lawful arrest and the arrest and seizure were not made pursuant to any warrant. The Court stated at page 534:

"The film itself is unquestionably the best evidence in any criminal prosecution for the public showing of an obscene movie. More importantly, however, it is a well-known fact that moving picture films may be and often

are altered by adding or deleting one or more scenes for showing at a particular theater or exhibition. The absolute necessity of retaining an exact content of the film as shown at the time of the commission of the alleged offense is obvious"

The Court also pointed out in that case that if a prior adversary hearing were required before seizure of the film could be made, the film might easily be shipped to another location before the arrest could be effectuated. The Court considered that:

" . . . [A] procedure which is not unreasonable and not oppressive should not be contained so as to completely frustrate a state's legitimate right to prohibit a public showing of obscene movies."

Adoption of a rule concerning prior adversary hearing as suggested by Petitioner would place peace officers, local law enforcement officials, and prosecutors in the untenable position of trying to enforce laws which the Supreme Court has indicated are lawful, with their hands tied as a result of a Supreme Court decision making enforcement a practical impossibility. Such an unbalanced state of affairs would promote a disrespect for law and order—since the public would observe individuals openly displaying obscenity while police officers and prosecutors stand by in frustration.

A rule requiring a prior adversary hearing before seizure of obscene material would also place the courts in the ridiculous position of advising on whether there is probable cause to prosecute for obscenity and then deciding the ultimate issue. Such a rule would provide the courts of the Commonwealth and other states with a procedural nightmare. The dignity of the judiciary should be above such requirements.

C. The Commonwealth of Kentucky Did Not Act in Bad Faith in the Procedures Used for Arrest and Seizure in Connection With the Showing of the Obscene Film.

As noted in the statement of the case, the Commonwealth Attorney, who is the chief prosecuting attorney for that district in Kentucky, accompanied the Sheriff to the theater. He therefore had the opportunity of advising the Sheriff on whether in his estimation there was probable cause to believe that an obscene motion picture was being shown to the public in the Sheriff's presence. The Court might well be concerned with the possibility of harassment of a theater owner by a peace officer for personal interest, and of arresting and seizing film when there is no possibility or probability of a successful prosecution. In the present case, however, the Commonwealth Attorney accompanied the Sheriff and in fact did prosecute the case expeditiously.

It should also be pointed out that the arrest and seizure of the film took place on September 29, 1970 (A. 9). The Grand Jury in Pulaski County issued an indictment on September 30, 1970 (A. 4). Although a failure to indict by a grand jury would not have assured Petitioner of his release or the release of his film, it is quite apparent that the Commonwealth of Kentucky used every means at its disposal to insure a speedy review by a grand jury of the action taken by the Sheriff and the prosecuting attorney on the night before. It can be presumed that the Grand Jury, after reviewing evidence, determined that there was probable cause by which to issue the indictment within hours after the arrest and seizure of the material. (See *U.S. v. Thirty-seven Photographs*, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971)). It is therefore obvious that the seizure of the material by the Sheriff of Pulaski County was not taken lightly, nor was the right to freedom of speech of the Petitioner handled in such a manner as to harass him or to deprive him of his right of expression.

CONCLUSION

The Court's concern on this subject and its decision to review and make a determination on the issue of the seizure of obscene material incidental to a lawful arrest is understandable.

In light of the confusion experienced by prosecutors, law enforcement officials, as well as theater operators resulting from what has been interpreted by some as a rule requiring a prior adversary hearing before an arrest and the seizure of obscene material, it is understandable why this Court has chosen to review this issue and settle the question once and for all. It is respectfully suggested to this Court that what is needed is a fresh approach to this entire problem. The rule should be firmly established by this Court that the test in seizure of obscene motion pictures should be that a peace officer may seize such film if such seizure is for the purpose of introduction into evidence as opposed to seizure for the purpose of suppression of ideas. In those instances where seizure is made, First Amendment rights would then require that if the theater owner had a second copy of the film available, he might then immediately begin showing the film again without interruption or interference by the arresting officers.

A film must obviously be introduced into evidence, since in *Roth v. U. S.*, *supra*, this Court stated that the alleged obscenity must be taken as a whole to determine whether it appeals to prurient interest. The prosecution must also show that the film offends contemporary community standards. This cannot adequately be done without the jury's viewing the entire film. There is no way of viewing the film as a whole to decide whether it appeals to prurient interest or has redeeming social value by oral statements of witnesses describing segments; therefore the entire film should be viewed by the jury for determination of obscenity and it must be seized quickly before it is altered or transported elsewhere.

The fallacy in the seizure argument by Petitioners is that they assume that when a film is seized there will be only one copy available and that the public will be thereby prohibited from viewing the film. If the theater owner wants to ensure an uninterrupted showing of the film, and if he realizes that the film in question is borderline and might result in an obscenity

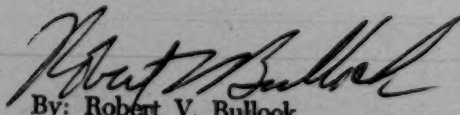
arrest, it is not too great a burden to require him to keep on hand a second copy of the film in the event of an arrest and seizure, and this cost can be assumed as a cost of doing such business. Should it be necessary, a theater owner could resort to the courts to resolve civilly any dispute where a film is needed for immediate showing. A balancing of the equities between freedom of speech on the one hand and protection of the public from obscenity on the other requires that any additional burden such as maintaining a second copy of the film be borne by the theater owners.

It should be emphasized once again, as it was noted by the Kentucky Court of Appeals in its legally and factually correct opinion, that it was conceded by Roaden's counsel in closing argument to the jury that the film is obscene. The only question then left to this Court to decide is whether, when an officer makes a lawful arrest and seizes an obscene film, that film can be admitted into evidence so that the jury might have the benefit of the best evidence available. It is respectfully urged by the Commonwealth that such evidence should and must be admitted by the Court.

For the reasons stated above, it is respectfully urged that the decision of the Kentucky Court of Appeals in this matter should be affirmed.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

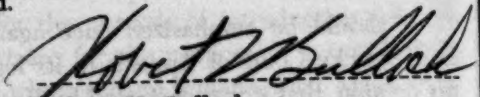


By: Robert V. Bullock
Assistant Attorney General
The Capitol
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Robert V. Bullock, one of the counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 10th day of August, 1972, I served three copies of the Brief for Respondent on Phillip K. Wicker, 120 North Main Street, Somerset, Kentucky 42501, Attorney for Petitioner, by mailing the copies in a duly addressed envelope with first class postage prepaid, to said attorney at the above address. I further certify that all parties required to be served have been served.



Robert V. Bullock

Assistant Attorney General

IN THE

Supreme Court of the United States

Case No. 100

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1134

Supreme Court, U.S.
FILED

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MICHAEL RODAK, JR., CLERK

HARRY ROADEN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent,

On Petition for a Writ of Certiorari to the Court of Appeals
of the State of Kentucky

Motion of Charles H. Keating, Jr., for Leave to File a
Brief as Amicus Curiae in Support of Respondent
with Brief Annexed

CHARLES H. KEATING, JR.,
18th Floor, Provident Tower,
One East Fourth Street
Cincinnati, Ohio 45202
Amicus Curiae

PROOF OF SERVICE

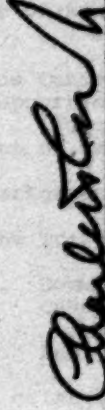
I, CHARLES H KEATING, JR., Movant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of September, 1972 I served copies of the foregoing Motion of Charles H Keating, Jr. for Leave to File a Brief as Amicus Curiae in Support of Respondent with Brief Annexed on the

following:

(1) The Petitioner, HARRY ROADEN, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to his attorney of record, PHILIP K. WICKER; and,

(2) The Respondent, COMMONWEALTH OF KENTUCKY,

by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, EDWARD W. HANCOCK.



CHARLES H KEATING, JR.

Amicus Curiae

18th Floor, Provident Tower
Cincinnati, Ohio 45202
513-381-1150

DECLARATION OF RECEIPT

I, CHARLES W. KATZ, JR., do hereby certify that a member

of the Bar of the Supreme Court of the United States, hereby certifies

that on the 10th day of September, 1911, I received copies of the

following books of Charles W. Katz, Jr., 1011 10th St., N.W., Wash., D.C.

1. "The American Bar Association" 1911, 100 pages, \$0.50

2. "The American Bar Association" 1911, 100 pages, \$0.50

3. "The American Bar Association" 1911, 100 pages, \$0.50

4. "The American Bar Association" 1911, 100 pages, \$0.50

5. "The American Bar Association" 1911, 100 pages, \$0.50

CHARLES W. KATZ, JR.
[Signature]

SUBJECT INDEX

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I.

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IN THE
Supreme Court of the United States

October Term, 1972
No. 71-1134

HARRY ROADEN,

vs.

Petitioner,

COMMONWEALTH OF KENTUCKY,

Respondent,

On Petition for a Writ of Certiorari to the Court of Appeals
of the State of Kentucky

**Motion of Charles H. Keating, Jr., for Leave to File a Brief
as Amicus Curiae in Support of Respondent.**

Charles H. Keating, Jr. (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the U. S. Supreme Court, for leave to file a brief as Amicus Curiae in support of the Respondent, Commonwealth of Kentucky. The consent of Phillip K. Wicker, Attorney for Petitioner, has been requested and was refused.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study and effort to assisting law enforcement in combating the spread of obscenity in the Nation; first, as the founder and co-

counsel for Citizens for Decent Literature, Inc., and more recently as a member of the Presidential Commission on Obscenity and Pornography. Moving Party is also the Appellee in an obscenity case pending before this Court, entitled "A Motion Picture Film Entitled 'Vixen,' Russ Meyer, Eve Productions, Inc., Malibu, Inc. and Clarence P. Gall v. State of Ohio ex rel Charles H. Keating, Jr., October Term 1971, No. 71-599, as to which this Court on January 12, 1972, requested a response. The latter appeal was carried over to the 1972 October Term without this Court having taken action thereon.

In Moving Party's view, the question which is before this Court in Roaden v. Kentucky, i.e.:

"In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material, a violation of due process?"

has no sound basis in legal logic^{1/}, having literally

1. As to the validity of Amicus' statement that there is "no sound basis in legal logic," see the shrewd observation of Justice Batjer, dissenting in Glass v. Eighth Judicial District, 486 P.2d 1180 (July 2, 1971) at 1189, regarding the anomalous result being reached: . . .

"In United States v. Wild, 422 F.2d 34 (2nd Cir. 1969), that court said: 'These cases (A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12

emerged from out of nowhere. Encouraged by language of certain members of this Court, taken out of context from "prior restraint" cases, and nourished by

L.Ed.2d 809 (1964), and *Marcus v. Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961)), are inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction. The seizures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe *Marcus* and *A Quantity of Books* can be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases.' Cf. *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288 (S.D.N.Y. 1969), affirmed 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970), where it was held that an adversary hearing is not a prerequisite to the validity of an arrest for obscenity. Here, on theory, Erwin Glass could have been arrested without a prior adversary hearing, locked up, and prevented from exhibiting to the public his non-obscene materials, but following the majority opinion his two films 'Wanda', the hypnotist, lashed into submission, for mature adults 'only,' and 'Title Withheld,' only for the mature adult who understands, must be granted an adversary hearing before they can be held. (Our emphasis.)

If a police officer may not seize a positive film print as the instrumentality of the crime incident to an arrest upon probable cause, should he not also be required to issue a citation rather than arrest the personal liberty of a person who is alleged to have committed any crime? See footnote 42, *infra*, at page 84 and the opinion of Los Angeles Superior Court Justice Thaxton Hanson (Appendix 1) which points a finger at the moral vacuum in our courtrooms.

this Court's silence on the matter when its voice was sorely needed,^{2/} the spurious claim of a so-called "right to an adversary hearing" has succeeded in bootstrapping itself to its present status as a major issue for this Court's consideration.

Throughout its gestation period, this "false pregnancy" has played havoc with law enforcement

2. During the four years of silence since Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 20 L. Ed.2d 1313, 88 S.Ct. 2103 (June 17, 1968), brush-fire wars have developed between the state and federal judiciary in practically every state in the Nation. Representative of this open warfare on this issue is the struggle taking place in the two pornography capitals of the U.S.A.

In the East, compare New York v. Heller, 29 N. Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (Dec. 1, 1971) and the New York State rule authorizing a seizure under an ex parte search warrant after a surreptitious viewing by a judge, certiorari granted by this Court in Heller v. New York, ___ U.S. ___, 32 L.Ed.2d 115, ___ S.Ct. ___ (May 15, 1972) with Bethview Amusement Corp. v. Cohn, 416 F.2d 410 (2d Cir. Oct. 6, 1969), requiring an adversary hearing before any seizure, certiorari denied 397 U.S. 920, 25 L.Ed.2d 101, 90 S.Ct. 929 (Feb. 24, 1970). Further, the result reached on appeal to the second circuit may very well depend upon the panel of judges hearing the case. Compare Bethview, supra (Hayes, Waterman, Bartels) which ordered the return of a film with U.S. v. Wild, 422 F.2d 34 (2nd Cir. Oct. 29, 1969) (Lumbard, Smith, Feinberg) which refused to disturb a conviction which was based upon evidence taken without an adversary hearing, rehearing denied 422 F.2d 38 (Feb. 2, 1970), cert. den. by this Court in 402 U.S. 986, 29 L.Ed.2d 152, 91 S.Ct. 1644 (May 17, 1971). For a modification of the rule in Heller v. N.Y., which follows the Kentucky Court of Appeals decision herein, see New York v. Morgan, 326 N.Y.S.2d 976 (Sept. 2, 1971), discussed at footnote 28, infra. See also

in the communities of this Nation. A plethora of case histories in the National Reporter Systems underscores this Merlin-inspired illusion as the smoke screen generator which has shepherded the entry of hard-core films into the neighborhood theatres and drive-ins and guaranteed their remaining there, without the reach of effective law enforcement. The condition of our newspaper movie ads reminds us daily that, because effective local

New York v. O'Brien, 320 N.Y.S.2d 425 (Apr. 7, 1971) where a trial court in Nassau County denied the district attorney's application for an adversary hearing prior to the issuance of a search warrant on the grounds that the New York law did not provide such a procedure. It would appear that in Lido East Theatre Corp. v. Murphy, 337 F.Supp. 1345 (Feb. 15, 1972) and the cases cited therein at footnote 8, the Federal District Court in the Southern District of New York has disregarded this Court's ruling in Perez v. Ledesma, 401 U.S. 82, 84 (Feb. 23, 1971) that:

"The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, see Stefanelli v. Minard, 342 U.S. 117...."

In the West, compare California v. DeRenzy, 275 Cal.App.2d 380, 79 Cal.Rptr. 777 (Aug. 1, 1969) and the California State Rule, which permits a seizure under an ex parte search warrant where supported by affidavits which focus searchingly on the subject matter, with Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir., May 13, 1970), which requires an adversary hearing before any seizure; vacated and remanded for reconsideration in the light of Perez v. Ledesma, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674 (Mar. 29, 1971). See also footnote 3, infra, and Los Angeles County Superior Court Judge Thaxton Hanson's opinion in Cinema Classics at Appendix A, infra.

law enforcement has been neutralized by this issue, we are presently pursuing the moral standards of biblical Sodom and Gomorrah^{3/}. In the process, we have succeeded in broadcasting to the world our present worth, not as the free, moral people we have always prided ourselves as being, but rather as a Nation of "slobs" which is about to succumb as the natural consequence of its own degeneracy.

This Court's recent grant of certiorari in Heller v. N.Y., 1971 October Term, No. 71-1043, and Alexander v. Virginia, 1971 October Term, No. 71-

3. If one case, more than the others, focuses attention on the adversary hearing issue and this Court's responsibility for the hard-core pornography which smothers this Nation, it is the Cinema Classics case in Los Angeles. See Judge Irving Hill's opinion in Cinema Classics, Ltd., a Calif. Corp. v. Busch, District Attorney for Los Angeles County, 339 F. Supp. 42, 49 (Feb. 22, 1972) tout-ing such materials as "presumptively First Amend-ment materials" and ordering the return of hard-core materials seized under a search warrant. See also, this Court's order of Mar. 20, 1972, in Busch v. Cinema Classics, ___ U.S. ___, 31 L.Ed. 2d 450, ___ S.Ct. ___ (Mar. 20, 1972) denying an ap-plication for a stay of the preliminary injunc-tion therein and the memorandum opinion of Los Angeles Superior Court Judge Thaxton Hanson which followed in that case. Judge Hanson's opinion, a copy of which appears at Appendix A, points an accusing finger at the federal interference and excoriates the moral vacuum which exists in this Nation's courtrooms. Forced to hand over 13,500 reels of hard-core, pornographic films, carrying a street value of \$500,000 (see Appendix A), to its depraved manufacturers, Judge Hanson asks the hard question, "Why are some 13,500 reels of hard-core pornography, found to be obscene after a full hearing and declared contraband, being ordered returned? Why? What is going on here?"

1315, both of which share a common issue with Roaden, has finally fixed the focus. Moving Party contends that, treated separately or grouped together, these three cases do not in themselves, embrace all of the subsurface problems which underlie the main issue, nor do they give proper attention to the peripheral considerations which orbit the main controversy. To lend assistance to the Court in this regard, Moving Party respectfully requests that he be granted leave to file a brief *amicus curiae*, setting forth arguments on the above jurisdictional question as it applies to the facts of this and other cases and other related collateral matters.

Dated: September 11, 1972

CHARLES H. KEATING, JR.
Amicus Curiae.

IN THE
Supreme Court of the United States

October Term, 1972
No. 71-1134

HARRY ROADEN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent,

On Petition for a Writ of Certiorari to the Court of Appeals
of the State of Kentucky

Brief Amicus Curiae of Charles H. Keating, Jr., in Support
of Respondent.

Statement of the Case.

A. Background

On Monday evening, September 28, 1970, James Strunk, a Deputy Sheriff of Pulaski County, Kentucky, who had served in that capacity for "somewhere around four months", viewed a motion picture "Cindy and Donna", being exhibited on the screen of the 27 Drive-In Theatre on South Highway in Pulaski County (Appendix, hereinafter designated "A" at pg.20). At that time he was on the road outside the Drive-In, right beside it (A 21).

His presence there as pursuant to the advice of Pulaski County Sheriff Gilmore Phelps, who told him to, "Keep an eye on the movie down there" From that position he saw about 30 minutes of the film, "Where the girls were loving" (A 20).^{4/} On the following evening, Tuesday, Sept. 29, 1970, Strunk's immediate superior, Pulaski County Sheriff Gilmore Phelps, who was then serving in his 9th or 10th year of service as Chief Law Enforcement Officer of Pulaski County, paid the admission price and entered the Highway Drive-In Theatre (A 8, 9), in company with the Prosecuting Attorney for that district (A 16, 17).^{5/} After viewing the entire movie, Sheriff Phelps proceeded to the projection booth, where he found Petitioner Roaden operating the projection machine. He arrested Roaden, whom he recognized as the manager of the theatre, on a charge of exhibiting an "obscene" film to the general public and seized the film (A 9, 10). On the following day, Wednesday, Sept. 30,

4. At the trial, Deputy Sheriff Strunk viewed the film with the jury (the print which was seized incident to the arrest on the evening of Sept. 29, 1970) and thereafter testified that it was the same movie he had viewed from the road on the previous evening, Sept. 28, 1970. (A 29)

5. The fact of the prosecuting attorney's attendance was brought out on cross-examination. See Footnote 11.

1970, the matter was presented to the Grand Jury of Pulaski County, which returned a true bill of indictment (A 3, 4), charging Harry Roaden with a violation of Kentucky Revised Statutes, Section 436.101.^{6/} Kentucky Revised Statutes, Section 436.101 reads, in part, as follows:

"(1) As used in this section

(b) 'Matter' means any motion picture

(c) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matter."

"(2) Any person who, having knowledge of the obscenity thereof . . . in this

6. The Pulaski County Grand Jury indictment read in part: "Indictment No. 4432, KRS Sect. 436.101. The Grand Jury charges: On or about the 29th day of Sept. in Pulaski County, Kentucky, the abovenamed defendant did unlawfully and wilfully publish and exhibit, or had in his possession with intent to publish and exhibit, an obscene motion picture entitled, 'Cindy and Donna.' Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky."

state . . . publishes . . . exhibits
. . . or has in his possession with in-
tent to . . . exhibit . . . any obscene
matter is punishable by fine . . . or by
imprisonment in the County jail for not
more than 6 months"

On October 3, 1970, (three days after the ar-
rest, Petitioner appeared in the Pulaski Circuit
Court and entered a plea of not guilty and the
case was set for trial on October 20, 1970,
(20 days after the arrest) (A 1).

On October 12, 1970 (12 days after the ar-
rest), Petitioner filed a motion to suppress
the film as evidence and to dismiss the indict-
ment on two grounds ^{7/} (A 6, 7):

"1. That the evidence was improperly, un-
lawfully and illegally seized, contrary to the

7. Petitioner did not move to regain posses-
sion of the film either as an ancillary matter
in the criminal proceedings or by separate civil
lawsuit. Amicus questions whether Petitioner
may now press a First Amendment claim based upon
unreasonable previous restraint. See Johnson v.
Common. of Kentucky, 475 S.W.2d 893, 894 (Dec.
17, 1971), where the Kentucky Court of Appeals
said: "Since no such step was taken in the pres-
ent case, this Court is of the view that these
appellants may not now complain that the state
authorities retained possession of the film, since
they never sought a judicial order for the return
of that material...." Not every previous restraint
is unlawful. U.S. v. 37 Photographs, 402 U.S. 363,
374, 28 L.Ed.2d 822, 833, 91 S.Ct. 2221 (May 3,
1971) and Point IB2, infra, at page 85.

procedure provided by Statute and the laws of the land.

"2. That without the improperly, unlawfully and illegally seized evidence an indictment would not be returnable, and therefore, should be dismissed ^{8/}"

Petitioner noticed his suppression motion for a hearing date of October 16, 1970 (16 days after the arrest) and arguments were heard on that

8. See Point IB1(a) infra, at page 71. As to whether an indictment would be returnable, absent the film and using only testimonial evidence, see Bryers v. Texas, which upheld the indictment on the basis of probable cause, but reversed the conviction after a trial on the merits on the ground that the film was indispensable evidence and had to be seen by the trier of fact. In many cases it may be impossible for law enforcement to obtain the special projection equipment which is necessary to project the film print.

In Louisiana v. Gulf State Theatres of Louisiana, Inc., et al., the district attorney brought an action under the procedure prescribed by the Abatement of Nuisances Statutes, Sect. 4711-17 of Title 13 of the Louisiana Revised Statutes, to abate as a public nuisance the showing of the "3D" Stereovision motion picture film, "The Stewardesses." The "3D" motion picture projection process requires special projection equipment which the film distributor delivers to the exhibitor with the "3D" positive film print. In this frustrating situation (lacking a means of projection) the prosecutor offered the testimonial evidence of several witnesses as to what they saw and heard. The defense saw no reason to exhibit the film to the trial court. On June 29, 1972, the Louisiana Supreme Court, by a 4-3 decision, affirmed the trial court's decision enjoining the film as a public nuisance, but one month later (July 31, 1972) granted a rehearing in the same case by the same 4-3 vote, and the matter is now pending in that court.

date and the matter taken under submission. On October 20, 1970 (20 days after the arrest) the Pulaski Circuit Court Judge overruled the motion and on the same date commenced Petitioner's trial (A 1).

B. The Trial

At the trial, in the Pulaski Circuit Court, Sheriff Phelps and Deputy Sheriff Strunk were the only witnesses for the prosecution. The Petitioner testified as a witness on his own behalf.

1. Commonwealth of Kentucky - Case in Chief.

On direct examination, Sheriff Phelps testified as to the circumstances surrounding the charge: that he was the Sheriff of Pulaski County and had served two 4-year terms (A 8); that he was in his ninth or tenth year of service as Sheriff (A 9); that as Sheriff of Pulaski County he was the Chief Law Enforcement Officer of that county (A 9); that on the night of September 29, 1970, he viewed the film "Cindy and Donna" at the Highway 27 Drive-In on South 27, and observed other members of the general public there that night, but couldn't tell who they were (A 9); that he paid the admission price to gain admission to the theatre and after viewing the

film "Cindy and Donna," proceeded to the projection room of the theatre where he found the Petitioner, Mr. Roaden. He identified the Petitioner, who was in the courtroom as the person who operated the drive-in and the person whom he found operating the projecting machine in the projection room. He stated that he then arrested the Petitioner on a charge of showing an obscene movie to the general public and seized the film (A 10).

When asked to describe to the court and jury "the general nature of what the motion picture showed on the screen there at the Drive-in Theatre that night" (A 10), defense counsel Harris made the following objections: "I object to this defendant describing it because the film itself is the best evidence ^{9/} Mr. Phelps, of necessity would only be giving his impression or opinion, and not finding facts." (A 11) In ruling on the objection, the trial judge stated, "I am going to permit him to tell what the film was about as a general proposition, but not to go into full details, because if the picture is

9. Having objected to the testimonial evidence on the ground that the film itself was the "best evidence," defense counsel then objected to the introduction of the "best evidence." See Footnote 10.

exhibited to the jury, they can see the film themselves, but just for identifying, for the purpose of identifying the film that I presume will be introduced" (A 11) Thereafter, in response to the prosecutor's question, "Now, subject, Sheriff, to the court's limitations which you have heard, tell the court and jury about the film?" (A 11), Sheriff Phelps very briefly identified the contents of the film (A 12).

Sheriff Phelps then described the physical evidence which he had seized . He produced those items in the courtroom and identified the same as the films which he had taken as evidence from the Drive-In by markings thereon, made at the time of the arrest. He stated that such evidence had been in his possession and control since that time, that it was in the same condition as when it was taken as evidence, and that it had not been changed in any degree whatsoever (A-12-14). Thereafter, against the defense counsel's objections, the five reels were admitted into evidence as Exhibits 1 through ^{10/}5 (A 15).

10. Assuming Petitioner's counsel was correct (Footnote 8) when he urged the trial court that the five reels were the "best evidence," note Professor Perkins' comments on the responsibilities of law enforcement investigators in such matters., appearing at Point IC, infra, at page 91.

On cross-examination by Defense Counsel Wicker, Sheriff Phelps stated that he had seen all of the film prior to having made the arrest and seizure. Asked if anyone was with him at the movie, he replied, "Yes, sir." Asked, "Who was with you?" he replied, "The Common-^{11/}wealth Attorney Mr. Rogers" (A 16). He acknowledged that at the time of the arrest and seizure of the film, he did not have a warrant (A 16, 17), nor had any prior determination been made before a magistrate or a judge that the film was obscene. Asked if, at the time he seized the film and made the arrest, he

11. Suppose Prosecuting Attorney Rogers had taken the stand as a witness during the Commonwealth's case in chief and told the court and jury that on Sept. 29, 1970, he was at the drive-in and had viewed the film in its entirety with Sheriff Phelps and had advised Sheriff Phelps, prior to arrest and seizure, that in his judgment it was obscene and in violation of the Kentucky Obscenity Statute. See in this regard, the result reached in Oregon v. Watson, ___ Ore. ___, 414 P.2d 337 (May 18, 1966) where the Oregon Supreme Court held such testimony to be prejudicial error:

"The prosecution called as an expert witness the then incumbent District Attorney of the County. He personally had purchased the book and had signed the complaint. The District Attorney was permitted to testify, over timely objection, that in his opinion the book in question satisfied all statutory requirements It is manifest error to permit a witness, who has no special qualifications so to testify, to tell the jury that in his opinion a crime has been committed."

knew what the definition of obscene was under the Kentucky Statute, he answered that he had read it and, asked what does it say, replied, "Obscene means to the average person applying contemporary standards the predominant appeal of the matter taken as a whole is to the prurient interest a shameful or morbid interest in nudity, sex or excretion which goes beyond customary limits of candor and description or representation of such matter" (A 17).

On redirect examination, Sheriff Phelps testified that at the time the picture was shown and the Petitioner arrested, he knew the manager of the theatre to be the Petitioner, Mr. Roaden (A 19).

Deputy Sheriff James Strunk testified, on direct examination, that he was a deputy under Sheriff Gilmore Phelps (A 19) and had served in that capacity for somewhere around four months (A 20); that on Sept. 28, 1970, Sheriff Gilmore Phelps advised him to keep an ^{12/}eye on the movies in Pulaski County (A 20);

12. Note that Deputy Sheriff Strunk, pursuant to Sheriff Phelps' order to "keep an eye on the movie in Pulaski County" viewed the film on the evening prior to its being viewed by Sheriff Phelps and the prosecuting attorney. It is reasonable to conclude from such evidence that the viewing by the latter officials was for the purpose of checking out Strunk's report.

that upon the night of Sept. 28, 1970, he had occasion to see about 30 minutes of the moving picture "Cindy and Donna" at the Highway 27 Drive-In on South Highway 27 (A 20); that at that time he was not in the Drive-In but was on the road outside the Drive-In right beside it (A 21).

The film "Cindy and Donna" was thereafter shown to the jury at the Virginia Theatre in Somerset, Kentucky (A 21), with the court instructing the sheriff's personnel in charge of the jury to arrest anyone for contempt of court who should be found to violate his rule that "there will be no demonstrations, there will be no words spoken . . . no acts of any kind done by and between any of the attorneys, the officers or anyone there. . . ." (A 23)

Upon returning from the viewing of the film, Sheriff Gilmore Phelps was recalled to the stand by the Commonwealth and testified that he had seen "Cindy and Donna" at the same time that it was shown to the jury at the Virginia Theatre and that he recognized it as the same one he had seen at the Highway 27 Drive-In Theatre on South 27th on Sept. 29, 1970 (A 27). Upon questioning by

- 13/

the court on its own motion, Sheriff Phelps testified that he took the films from the courtroom to the Virginia Theatre and that they were in his custody at all times from the time he took the films from the courtroom until he brought them back to the courtroom (A 27, 28).

14/

James Strunk was recalled to the stand by the Commonwealth and testified that he had seen "Cindy and Donna" at the same time it was shown to the jury at the Virginia Theatre and that he recognized it as the same motion picture that he viewed on the evening of Sept. 28, 1970, at the Highway 27 Drive-In Theatre from his position on the road outside the theatre (A 28, 29).

13 and 14. The trial court and the prosecuting attorney's respect for the technical rules governing the chain of evidence is a basic requirement of criminal justice. As noted by Professor Perkins (See Point IC, infra, at page 91) the rules which mandate the preservation of evidence are of equal benefit to the prosecution and to the defense. Were this Court to prevent the State of Kentucky from allowing the film print to be seized at the time of the arrest, will it not be complicating the trial issues in all motion picture obscenity cases? How is a state witness going to connect up what he saw at the time of the arrest with any autoptical evidence which might thereafter be offered? Similarly, what pitfalls will the defense encounter in laying a proper foundation? How will the finder of fact relate what one witness says about the content to what another witness says about the content?

2. Harry Roaden - The Defense

The Petitioner, Harry G. Roaden, testified on his own behalf and stated on direct examination that he was 36 years old and manager of the Highway 27 Drive-In Theatre (A 29); that he had been a resident of Somerset in Pulaski County, Kentucky, since 1953, and had been a theatre manager except for a short period during 1953 to 1955, when he was in the service; that on Sept. 28, 1970, he was manager of the Highway 27 Drive-In Theatre; that he did not own the theatre, nor did he have any control over the pictures that were booked but played whatever comes in; that no persons under 18 were admitted to see the film except babes in arms (A 30) and that such knowledge came to him from his cashier. Asked if he had any knowledge of the contents of the film, he stated that he had had no chance to see the film and that the first complaint he had received about the film was when Sheriff Phelps came to the projection booth. He stated he had been in the projection booth about two minutes when Sheriff Phelps arrived and that he had gone there because the cartoon was on upside down (A 31).

On cross-examination, he stated that the theatre was owned by Highway 27 Drive-In, Inc.

and that his uncle O. G. Roaden was one of the stockholders but that he was not (A 31); that he was hired to operate the theatre (A 30, 31) and a booking combine booked the pictures and a truck from Cincinnati dropped the films off at the door (A 32). He stated that the film "Cindy and Donna" showed on Sunday, Sept. 27, Monday, Sept. 28, and Tuesday, Sept. 29, 1970, and that during those three showings he did not see the motion picture. Asked if it was not his responsibility as manager and operator of that theatre to see that the movies that came there are projected on the screen at the scheduled time, he answered, "Yes, it is" (A 34). He stated that he did not stay at the box office all the time (A 34) but went over the field to see if everything was all right, such as to see if anyone was making a racket and tearing things up; that lots of times he had to be in the snack bar and during intermissions he made announcements from the projection room on the speaker system (A 35).

At the conclusion of Petitioner Roaden's cross-examination testimony, the defense rested.

In his arguments to the jury, defense counsel availed himself of the special provisions of the

Kentucky Revised Statute, Sect. 436.101(8) under which a jury is permitted to render a special verdict that the subject matter is obscene (See, Instruction 1 at A 45), while at the same time returning a general verdict of innocence, as where the "mens rea" evidence might not convince the jury beyond a reasonable doubt that the person charged was criminally responsible. (See Instructions 3 and 6, at A 45, 47).^{15/}

Addressing himself to the two separate issues which were before the jury, i.e., (1) The nature of the film "Cindy and Donna" and (2) the guilt or innocence of the Petitioner, defense counsel made the following arguments:

15. Kentucky Revised Statute, Sect. 436.101(8) provides as follows:

(8) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the material named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: 'We find the _____ (title or description of matter) to be obscene' or 'We find the _____ (title or description of matter) not to be obscene,' as they may find each item is or is not obscene."

This type of statute should have special appeal to certain justices on this Court who appear to have a volition against upholding state criminal convictions in obscenity cases. See the comments of the Texas Court on this type of statute in Bryers v. Texas, 480 S.W.2d 712, at 719, footnote 11.

"If the film which you saw yesterday was all that was on trial here, I would not be here, I would be good enough to tell you at the outset that, in behalf of Mr. Roaden, I am not going to get up here and defend the film observed yesterday, nor the revolting scenes in it or try to argue or persuade you that those scenes were not obscene" ^{16/} (A 36).

"Now, ladies and gentlemen, I don't have any doubt but that you will find ^{17/} the contents of that film obscene; but I do have doubt that you will find Harry Roaden guilty as the court tells you in Instruction No. 3, of wilfully and unlawfully exhibiting to the gen-

16 to 20. Defense counsel's remarks to the jury amount to admissions by the Petitioner that, based solely upon the autoptical evidence, Sheriff Phelps had "probable cause" to believe the Kentucky Obscenity Law was being violated. This is consistent with the failure of defense counsel to move to restore the film (see Footnote 4). While it has generally been recognized throughout our legal history that courts ordinarily will not order the return of property which is contraband, or whose possession is contrary to law, U.S. v. Jeffers, 342 U.S. 48, 96 L.Ed. 59, 72 S.Ct. 93 (1951), a notable deviation has been the notorious unconcern of certain members of this modern Court regarding contraband in the form of obscene matter.

eral public an obscene motion picture film entitled 'Cindy and Donna,' the defendant having knowledge of the obscenity thereof - having knowledge of the obscenity thereof;" (A 37)

"While this film leaves little to recommend it, nothing to recommend ^{18/} it, the State has failed to prove that Harry Roaden had any knowledge that the film was obscene (A 37)."

"Now, my friend, Mr. Rogers over here is very persuasive and no doubt he is going to get up and review with you scene by scene the disgusting elements of this film but if he does do ^{19/} that, that still does not mitigate the requirements that the State proved beyond a reasonable doubt that this man had knowledge of the obscenity of the film, nor has there been a line, phrase, or word of evidence offered by anyone that anyone ever complained to Mr. Roaden that the film was obscene." (A 38)

"I submit to you that although you ^{20/} may find that this film was obscene that you can still find Harry Roaden

not guilty, because it has not been proven beyond a reasonable doubt that he knew the contents of this film.

Thank you very much." (A 38)

On October 21, 1970, the jury retired to the jury room and after due deliberation returned into open court the following verdict (see Judgment of the Pulaski Circuit Court in Petition For a Writ of Certiorari at page 23):

"This jury finds the motion picture Cindy and Donna obscene. Foreman Paul Elliott. We, the jury find the defendant Harry Roaden guilty as charged, set his punishment \$1,000.00 fine and six months in jail. Paul Elliott, Foreman."

Upon appeal to the Court of Appeals of Kentucky, Petitioner urged as reversible error, the denial by the Circuit Court of his motion to suppress the film as evidence (Petition for Certiorari, Pages 25-27). On June 25, 1971, the Court of Appeals of Kentucky rendered its opinion in Roaden v. Kentucky, 473 S.W.2d 814, affirming the conviction. Rejecting Petitioner's argument concerning the illegality of the seizure, the Kentucky Court held the decisions of this Court in Marcus v. Search Warrants of Property, 367 U.S. 717 (1961), and A Quantity of Copies of Books v.

Kansas, 378 U.S. 205 (1964) were not applicable saying:

"Those decisions relate to seizure of allegedly obscene material for destruction or suppression, not to seizure incident to an arrest for possessing, selling, or exhibiting a specific item."

The Court of Appeals of Kentucky also stated that the decision of this Court in Lee Art Theatre v. Virginia, 392 U.S. 636 (1968) "is not applicable here," because in Lee Art Theatre ". . . the film had been seized pursuant to a search warrant, not incident to an arrest."

On December 17, 1971, the Court of Appeals of Kentucky denied a rehearing and issued its mandate affirming the Petitioner's conviction (Petition for Certiorari, Page 31). On Dec. 28, 1971, Petitioner filed a motion to stay execution and enforcement of the mandate, which motion was sustained on January 14, 1972, for a period of 90 days and has since been extended.

Summary of Argument.

I

The manner in which the Petitioner has phrased the jurisdictional question in his Petition for Writ of Certiorari, namely, "In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material a violation of due process of law?" obscures the basic legal proposition which is before this Court. Amicus submits that to analyze and resolve this multi-phased jurisdictional question requires that the responsive proposition be more narrowly drawn and refined. If Petitioner has a claim for denial of due process, he must be able to delineate the duties he claims were breached, and show where the Commonwealth has done or failed to do that which the law requires. By way of reply, Amicus' analysis is pointed in the opposite direction, i.e., toward establishing that the Commonwealth of Kentucky has breached no duties under the Constitution.

Due process was accorded Petitioner at each of the three stages of the criminal proceedings herein: (1) At the arrest; (2) when the film print was seized, and (3) when the film print was admitted into evidence.

Petitioner was arrested without a warrant for

showing an obscene movie to the general public. For the Commonwealth to prevail in warrantless arrests, three principles must be established: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest.

The public policy of the Commonwealth of Kentucky is strongly aligned against the public exhibition of obscene motion picture films. KRS Sect. 436.101(2), expressing that public policy, is clearly valid. Moreover, the special verdicts on (1) obscenity, and (2) guilt or innocence required by the Kentucky statute, offer a solution to the impasse reached by this Court on the scienter issue, and more than satisfy due process requirements. Defense counsel availed himself of these provisions of the law at trial. The jury weighed the evidence and arguments, and found against the Petitioner on both issues.

By virtue of a specific statute and the ruling case law in Kentucky, Sheriff Phelps had the authority to arrest a person without a warrant for a misdemeanor committed in his presence. The decisions of this Court indicate that rules such as these governing arrests are authorized by the Constitution to meet the practical demands of effective criminal investigation and law enforcement.

Whether a particular arrest without a warrant is constitutional or not depends solely upon whether, at the moment the arrest was made, the officer had "probable cause" to make it. Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. When the constitutionality of an arrest is challenged it is the function of this Court to determine whether the facts available to the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed.

Petitioner claims that no obscenity arrest can be validly executed until the question of obscenity has first been litigated in a civil court of law. That claim is highly unorthodox. A lone, dissenting judge in Ohio v. Albini stated the claim differently as "an unlawful delegation to the police of the plenary duty of the courts to determine whether there is probable cause to believe films obscene after arguments by both parties." Those arguments were foreclosed by this Court's decision in Gable v. Jenkins, 397 U.S. 592.

It seems obvious from Gable v. Jenkins that the State could have arrested Petitioner on the obscenity charge and, without seizure, proven their case by testimonial evidence of what the officer saw and heard.

The Kentucky Court of Appeals acted well within the scope of its authority when it decided that an obscenity arrest did not call for an exception to the general rule under Kentucky law as to warrantless arrests, where Kentucky procedures permitted the Petitioner to contest the issue of probable cause as an ancillary matter in the criminal trial, either by way of motion to suppress or restore, or in an independent civil action to restore the property. The Kentucky Court of Appeals' solution is the majority view at the present time.

In deciding this question, this Court must also keep in focus the due process considerations which support the Kentucky State Obscenity Statute. Those include the universal verity that obscenity is a public nuisance which is abatable under the law, and the ethical values shared by this Nation as a whole as defined in the state, federal, and city morality laws. These values exist for the benefit of the family unit which is at the very core of government in our Judeau-

Christian culture.

The public policy of the Commonwealth of Kentucky is strongly opposed to the public exhibition of obscene films and it was Sheriff Phelps' sworn duty to enforce that policy and uphold the law. Whether Sheriff Phelps' arrest without a warrant was constitutional or not depended upon whether or not he had probable cause to make the arrest. The factual issue of probable cause depends upon two factors: (1) The nature of the film itself -- the autoptical evidence, and (2) the capacity of a peace officer to evaluate obscenity in the light of the Roth standards. Petitioner's claim that the sheriff lacked such capacity was decided otherwise by the Kentucky Court of Appeals.

The record shows (1) the jury verdict; (2) the trial summation of defense counsel which concedes obscenity, and (3) a failure to attack the jury verdict on appeal. Where it is conceded that the nature of the film was sufficient to establish guilt of the charge, it must follow, as a matter of law, that the same was sufficient under traditional concepts to establish "probable cause" as a matter of fact. Independent of the personal capacity of Sheriff Phelps to make value judgments regarding the Roth standards, the record shows that Sheriff Phelps viewed the film in its

entirety in company with the County Prosecutor and it is reasonable to infer therefrom that the latter official was present at the Drive-In for the specific purpose of giving legal assistance to Sheriff Phelps on the obscenity issue.

Society has a legitimate interest in suppressing crime and detecting criminals which requires (1) that evidence be preserved intact; (2) that autoptical evidence be preferred over testimonial evidence, and (3) that the right of officers to seize the instrumentality of the crime itself be upheld as a deterrent to crime.

When there is an arrest for the exhibition of an obscene film, an emergent condition exists -- the positive film print which was used for projection must be preserved intact so as to prevent alteration or cutting. The state cannot purchase a copy nor, if they were able to, could it be assured that the same would be the identical version. Some courts have called the print "indispensable evidence." In others, such as California, the courts have called it the "best evidence." In any event, it is the instrumentality of the crime, and it has been recognized many times that, without it, the prosecution must fail, or be subject to reversal upon appeal. To prohibit the seizure of such evidence, under these circumstances, would com-

pletely frustrate criminal prosecution.

It is not a "search" where an officer observes contraband which is clearly visible from a place where an officer has a right to be. No search warrant is needed where the object sought is visible, open, and obvious to anyone employing his eyes. Even were this not so, the seizure herein was within the reach authorized by Chimel v. California, 395 U.S. 752.

Granted the law's preference for search warrants, a state is not required to resolve all such issues on the practicability of obtaining a search warrant. The Commonwealth of Kentucky was entitled under Ker v. California, 374 U.S. 231, to rely on this Court's express invitation for state courts to develop workable rules governing arrests and seizures and was authorized to choose a state rule under which administrative "probable cause" would be examined judicially after an arrest by a peace officer.

By waiving the motion to restore the film print prior to the criminal trial, Petitioner is now foreclosed from arguing prior restraint and First Amendment principles.

Petitioner was not deprived of due process when the positive film print was admitted into evidence at the trial. The Commonwealth attorney

during his case in chief showed a complete evidence chain of the film's custody from the time it was first taken into the possession of Sheriff Phelps at the time of the arrest until it was received in evidence as Exhibits 1 to 5, and shown to the jury.

The search for objective truth requires that the law search out and preserve as autoptical evidence that which constitutes the instrumentality of the crime. Such trustworthy evidence will not only serve to convict the guilty, but it may also, in a proper case, serve to free the innocent.

II

The past decisions of this Court do not support Petitioner's claim that the denial of an adversary hearing prior to arrest and seizure amounts to a violation of due process of law. Petitioner's claim is of recent origin, having evolved out of the 1966 October Term reversals and the language of certain members of this Court, taken out of context in Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961), A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Lee Art Theatre v. Virginia, 392 U.S. 636 (1968).

The A Quantity of Books case concerned not a criminal prosecution but an auxiliary means of attacking obscene materials -- civil suppression of all copies through injunction, a form of relief

given limited approval in Kingsley Book, Inc. v. Brown, 354 U.S. 436 (1957), such injunctive statutes are not always surrounded by the due process safeguards which automatically attend criminal prosecutions. The seizure of all copies, as in A Quantity of Books, pursuant to an injunction may impinge directly on the First Amendment, whereas a seizure of a single copy as evidence, antecedent to a criminal prosecution, is cognizable under the Fourth Amendment.

A chronological history of the cases on this issue in the lower courts demonstrates that misunderstandings have been placed upon the A Quantity of Books decision, stemming from a failure to distinguish its prior restraint civil aspects from criminal cases involving a seizure to obtain evidence for a criminal prosecution. Such misunderstandings have brought about a rash of bad law and chaos in this area of the law, including confrontations between state and federal courts of the order which resulted in the enactment of U.S. Code, Sections 2281 and 2284.. One comes away from a study of these cases with the conclusion that the results obtained depend not upon established principles of law but rather upon the personal philosophy of the members of the Court writing the opinion.

Amicus submits that a state is not required to create an exception to the traditional right of a police officer to seize evidence incident to an arrest. A distinction must be drawn between administrative probable cause determinations and judicial probable cause determinations. If the state judiciary prefers to test the officer's judgment after arrest by providing for an immediate adversary hearing procedure after arrest, there can be no serious claim of a constitutional infringement.

If, for no other reason than practicality and necessity, the Kentucky procedure must prevail. With the judicial work load being what it is, this Court cannot afford to make it a constitutional requirement that the trial court undertake adversary proceedings inquiring into every film, magazine, etc., that is manufactured, exhibited, sold, or offered for sale or exhibition, to see whether or not there is probable cause to believe the same to be the proper subject for an obscenity charge.

ARGUMENT.

Introduction

The manner in which the Petitioner has phrased the jurisdictional question in his petition for Writ of Certiorari, i.e.:

"1. In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material, a violation of due process of law?"

obscures the basic legal proposition which is before this Court and the starting point and direction in which the legal analysis must proceed if a rational solution is to be arrived at. To explain the obfuscation created by Petitioner's manner of stating the multi-phased question, amicus would refer this Court to Brumbaugh's Treatise on "Legal Reasoning and Briefing," Copyright 1917, Bobbs-Merrill Co., wherein the author states at page 16:

"And first of all, the initial sine qua non to the process of correct reasoning and argumentation is the proposal of a proposition. The basis of this demand rests upon the purpose of argumentation. Argumentation is a process to determine

the truth or falsity of some relation. To do this successfully requires that the particular relation be set out carefully for the purpose - it must be clear, single, and alone, and the only known method of securing such a result is to embody the relation in that formula of thought and language, known as the subject-predicate combination, that is to affirm a given thing to belong to a given subject. This formulation is known as a proposition.

Plain as this requirement seems to be, it is an indisputable fact that labored contentions have often vanished entirely when the ground of disagreement has been finally and formally reduced to a proposition. The tendency is to disagree upon provocation and to find no basis of disagreement upon reflection, analysis, and definition" (Our emphasis.)

The obvious predicate to any legal proposition which seeks to respond to the jurisdictional question herein is that something "violates due process." One might question, however, what the "subject" is or should be in the subject-predi-

cate response to this question as phrased. Does it concern (1) the arrest, or (2) the seizure of the film, or (3) the type of the subject matter, or (4) a combination of the three aforementioned law enforcement measures, or (5) something else?

Petitioner's manner of stating his responsive proposition, namely:

"The denial of an adversary hearing prior to seizure of the film in this case is inconsistent with the decisions of this Court, and amounts to a flagrant violation of due process of law."

provides no formula of thought and language which allows for a reasonable analysis or face to face confrontation with the fundamental issues. Language employed by this Court in other cases cannot be taken out of context and loosely extended so as to create a new rule of law, where to do so will draw in question other basic rules of law which have been long regarded as fundamental to our legal system. That other courts may have done so and concluded that an adversary hearing is necessary, offers little value as precedence where the underlying rationale of those decisions will not in-

dependently stand up under close scrutiny.

Amicus submits that to analyze and resolve this multi-phased jurisdictional question in a proper manner requires that the responsive proposition be more narrowly drawn and refined. If the Petitioner has a claim for denial of due process, he must be able to delineate the duties he claims were breached, and set forth at what specific point in the legal proceedings the Respondent has erred, i.e., at what point the Commonwealth has done that which the law prohibits, or has failed to do that which the law requires. In an effort to achieve that result by way of reply, Amicus has pointed his analysis in the opposite direction, i.e., toward establishing in a step by step analysis, that the Commonwealth, in administering the criminal laws of the State of Kentucky herein, has breached no duty owed Petitioner under the Federal Constitution.

I

DUE PROCESS OF LAW WAS ACCORDED THE PETITIONER AT EACH OF THE THREE STAGES OF THE CRIMINAL PROCEEDINGS BEING CONTESTED HEREIN, i.e: (1) AT THE TIME OF PETITIONER'S ARREST ON A CHARGE OF SHOWING AN OBSCENE MOVIE TO THE GENERAL PUBLIC: (2) WHEN THE POSITIVE PRINT USED BY PETITIONER TO PROJECT THE VISUAL IMAGES AND SOUND TRACK WAS SEIZED INCIDENT TO THE ARREST AS EVIDENCE BEARING ON THE CHARGE, AND (3) WHEN THE POSITIVE FILM PRINT WAS ADMITTED INTO EVIDENCE AT THE TRIAL, FOLLOWING THE COMMONWEALTH'S LAYING OF THE PROPER FOUNDATION IN THE CHAIN OF EVIDENCE.

A. Petitioner Was Not Deprived Of Due Process When He Was Arrested by Pulaski County Sheriff Phelps on a Charge of Showing an Obscene Movie to The General Public.

Sergeant Phelps arrested the Petitioner without a warrant for showing an obscene movie to the general public. For the Commonwealth to prevail in a warrantless arrest against a claim of denial of due process of law, three broad principles of law must be established: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest. See New York v. Lake Ronkonkoma Theatre, 59 Misc. 2d 438 at 442 (Mar. 6, 1969).

1. A Law Which Proscribes The Public Exhibition of Obscene Films And Designates The Same To Be a Misdemeanor Crime is Constitutional As A Valid Exercise of The Police Power of the State.

The public policy of the Commonwealth of Kentucky is strongly aligned against the public exhibition of obscene motion picture films. K.R.S. Sect. 436.101 (2) makes it a misdemeanor to exhibit an obscene motion picture film to the general public. That section provides, in part:

"(2) Any person who, having knowledge of the obscenity thereof . . . in this state exhibits, or has in his possession with intent . . . to exhibit . . . any obscene matter is punishable by fine of not more than \$1,000.00 plus . . . or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment"

Upon a conviction for a second offense, the penalty is doubled, and on a third conviction, the matter becomes a felony.

That such conduct may be lawfully proscribed as a crime under the police powers reserved to the states by the Tenth Amendment to the Federal Constitution is beyond question. See Alberts

v. Calif., 354 U.S. 476, 485, 493, (June 22, 1957;^{21/}
reaffirmed by this Court during the 1970 October
Term in U.S. v. Reidel, 402 U.S. 351, 355, 28 L.
Ed.2d 813, 817, 91 S. Ct. 1400 (May 3, 1971), where
this Court said, at page 355:

"The Court considered this sufficiently
clear to warrant summary affirmance of
the judgment of the United States Dis-
trict Court for the Northern District
of Georgia, rejecting claims that under
Stanley v. Georgia, Georgia's obscenity
statute could not be applied to book-
sellers. Gable v. Jenkins, 397 U.S. 592,
25 L.Ed.2d 595, 90 S.Ct. 1351 (1970)."

21. Just 15 years ago, a majority of this
Court noted that such was the universal judg-
ment." In Roth-Alberts, 354 U.S. 475, 485, this
Court stated:

"But implicit in the history of the First
Amendment is the rejection of obscenity
as utterly without redeeming social impor-
tance. This rejection for that reason is
mirrored in the universal judgment that
obscenity should be restrained, reflected
in the international agreement of over 50
nations, in the obscenity laws of all of
the 48 states, and in the 20 obscenity
laws enacted by the Congress from 1842 to
1956. This is the same judgment express-
ed by this Court in Chaplinsky v. New
Hampshire, 315 U.S. 568, 571, 572, 86 L.
Ed. 1031, 1035, 62 S.Ct. 766;"
(Our emphasis.)

See also footnote 29, infra, at page 60.

- (a) *The Kentucky Statutory Procedure, In Permitting The Jury (or Court) To Give The Benefit of The Doubt to Persons Accused Under the Law, Amply Meets Due Process Requirements.*

In the past, this Court has been troubled by the "mens rea" aspect of criminal proceedings in obscenity cases. See Smith v. California, 361 U. S. 147, 4 L.Ed.2d 205, 80 S. Ct. 215 (Dec. 14, 1959) and note, in particular the distressing result reached in the Redrup, Austin and Gent cases, cert. granted, limited to the "scienter" issue in Redrup v. New York, 384 U.S. 916, 16 L.Ed.2d 438, 86 S.Ct. 1362 (Apr. 25, 1966) but decided on other grounds in a no-clear majority decision in Redrup v. New York, 386 U.S. 767, 18 L.Ed.2d 515, 87 S. Ct. 1414 (May 8, 1967). The special verdict requirements of the Kentucky Statute, set forth at footnote 15, offer a solution to this impasse. Had KRS, Sect. 436.101(8) been a part of the Redrup facts, this Court could have resolved the question as to which jurisdiction had been noted in Redrup (see 16 L.Ed.2d 438).

Defense counsel availed himself of the special provisions of KRS Sect. 436.101(8) under which a jury is permitted to render a special verdict that the subject matter is obscene, while at the same time returning a general verdict of inno-

cense, as where the "mens rea" evidence might not convince the jury beyond a reasonable doubt that the person charged was criminally responsible.

(See defense arguments in Statement of the Case, supra, at page 22.). The jury of 12 persons weighed the evidence and the arguments, and thought otherwise. (See Statement of the Case, supra, at page 25).

2. Under Kentucky Law, Sheriff Phelps As A Peace Officer Had The Authority To Arrest a Person Without A Warrant for A Misdemeanor Committed In His Presence.

At Common Law, an arrest for an offense less than a felony could not be made without a warrant unless it also involved a breach of the peace, using the latter phrase in the narrow sense of a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order. A few of the modern statutes limit the authority of the peace officer to arrest without a warrant for a crime committed in his presence to the same extent as it was limited at Common Law; but in a great majority of the states at the present time, a peace officer has authority under the statutes to arrest for any public offense committed in his presence. Perkins, Elements of Police Science, at 250; 1 Antieau, Modern Constitutional Law, at 262.

This Court has recognized that the states are not precluded from developing workable rules governing arrests to meet "the practical demands of effective criminal investigation and law enforcement." Ker v. Calif., 374 U.S. 23, 34, 10 L.Ed.2d 726, 738, 83 S.Ct. 1623 (June 10, 1963) and in Johnson v. U.S., 333 U.S. 10, 15, 92 L.Ed. 436, 441, fn. 5, 68 S.Ct. 367 (1948) has stated that: "State law determines the validity of arrests without warrants." It has generally been recognized that where a statute so permits, a peace officer may lawfully arrest without a warrant one who has committed or is committing a misdemeanor in his presence or within his view, even though it does not amount to a breach of the peace, 6 C.J.S., Arrests, Sect. 6, at page 589, and such procedures traditionally have been thought to be constitutional. Johnson v. U.S., 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948). Following the majority rule, the Commonwealth of Kentucky, by statute, granted such authorization to peace officers. KRS Sect. 431.005(1) provides, in part:

"A peace officer may make an arrest
... without a warrant when a ...
misdemeanor is committed in his presence
... ."

Ingle v. Commonwealth, 264 S.W. 1088, 204 Ky. 518;
Rawlings v. Commonwealth, 230 S.W. 529, 191 Ky.
401; Fugate v. Commonwealth, 219 S.W. 1069, 187
Ky. 564; Commonwealth v. Chaplin, 211 S.W. 2d 841,
307 Ky. 630; Commonwealth v. Lewis, 217 S.W. 2d
625, 309 Ky. 276; Butcher v. Adams, 220 S.W. 2d
398, 310 Ky. 205; Commonwealth v. Hagen, 464 S.W.
2d 261.

3. Whether A Particular Arrest Without A Warrant Is Constitutional
Or Not Depends Upon Whether At The Moment The Arrest Was
Made, The Officer Had "Probable Cause" To Make It.

In Ker v. California, 374 U.S. 23, 34, 10 L.
Ed.2d 726, 739, 83 S.Ct. 1623 (June 10, 1963), it
was recognized that, in order for an arrest with-
out a warrant to be lawful under the Constitution,
it had to be based upon "probable cause."^{22/}

In Draper v. U.S., 358 U.S. 307, 3 L.Ed.2d 327,
79 S.Ct. 329 (1959), this Court recognized that
"probable cause" as the name implies, involves prob-
abilities; that these are not technicals, but are

22. While it has been suggested in a different
context (in the home) that warrantless probable-
cause arrests may not be made in the absence of
exigent circumstances and that, given the oppor-
tunity, the arresting officer must seek a warrant,
the case law in this area holds otherwise. See
Mr. Justice White dissenting in an opinion in
which the Chief Justice joined in Coolidge v. New
Hampshire, 403 U.S. 443, 511, footnote 1, 29 L.
Ed.2d 564, 609, footnote 1, 91 S.Ct. 2022.

the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act; and that probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they have reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

The standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest are at least as stringent as the standards applied with respect to the magistrate's assessment. Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560, 566, 28 L.Ed.2d 306, 312, 91 S.Ct. 1031 (Mar. 29, 1971). Such standards, however, do not require that quantum or quality of proof which is necessary to establish guilt, "Probable cause" for an arrest may exist even though the person arrested turns out to be innocent. Henry v. U.S., 361 U.S. 98, 102, 4 L.Ed.2d 134, 138, 80 S.Ct. 168 (Nov. 23, 1959).

The question is not whether the person responsible for the arrest thought the facts to constitute probable cause, but whether the Court thinks that such facts constituted probable cause. Director General of Railroads v. Kastenbaum,

263 U.S. 25, 68 L.Ed. 146, 44 S. Ct. 52 (1924).

When the constitutional validity of an arrest is challenged, it is the function of this Court to determine whether the facts available to the officer at the moment of the arrest ^{23/} would warrant a man of reasonable caution in the belief that an offence had been committed. Beck v. Ohio, 179 U.S. 89, 13 L.Ed.2d 142, 148, 85 S. Ct. 223 (1964).

4. The Petitioner Is In Error When He Claims That the "Probable Cause" Determination Which Must Precede and Which Authorizes An Arrest For An Obscenity Crime Is The Exclusive Province Of The Judiciary.

The Petitioner's attack herein on the arrest without a warrant does not center on traditional "probable cause" concepts; rather it flows from the highly unorthodox claim that "probable cause" in movie cases may not be determined by either a peace officer or a county prosecutor, and that no obscenity arrest can be validly executed until the question of obscenity has first been li-

23. Petitioner's attack, both in the Court of Appeals below and here, does not draw in issue "the facts available to the officer at the moment of the arrest." His argument is that such an inquiry is not apposite, and that, as a matter of law, in a case such as this, no set of facts will justify a warrantless arrest by an officer.

24/
tigated in a civil court of law. Analytically speaking, the Petitioner's claim is more succinctly stated in the dissent of Justice Brown of

24. What is Petitioner prepared to say about the policy of the law which gives the grand jury the right to determine "probable cause?" The grand jury indictment against Petitioner was returned on Sept. 30, 1970, the day after the arrest. See *Ex Parte U.S., Pa.*, 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283 and 22 C.J.S. Criminal Law, Sect. 345 at p. 893, reading:

"The finding of an indictment, fair on its face, by a properly constituted grand jury, conclusively determines the existence of probable cause"
(Our emphasis.)

See also 22 C.J.S. Criminal Law, Sect. 356, at p. 916, reading:

"Under the Federal Rules of Criminal Procedure, Rule 30(b) (3) 18 U.S.C.A. where the prosecution is by indictment, the indictment constitutes conclusive proof of reasonable cause"

In *California v. Luros*, 92 Cal. Rptr. 833, 480 P. 2d 633 (Feb. 18, 1971) the California Supreme Court reinstated a grand jury obscenity indictment saying, at p. 636:

"It is not necessary, however, that evidence of contemporary community standards be received on the issue of probable cause. (See *Aday v. Superior Court*, supra, 55 Cal.2d at pp. 798-799, 13 Cal. Rptr. 199, 362 P.2d 47.) A determination of obscenity may therefore be made by a grand jury, insofar as the issue of probable cause is concerned, without the necessity of receiving evidence as to such standards." (226 Cal.App.2d at p. 531, 38 Cal. Rptr. at p. 206.)

See also *California v. Cimber*, 76 Cal. Rptr. 382, 384 (Feb. 10, 1969) and *California v. Sarnblad*, 103 Cal. Rptr. 211, 215 (July 20, 1972).

the Ohio Supreme Court in Ohio v. Albini, 31 Ohio St.2d 27, at 34 (July 5, 1972)^{25/} wherein he stated the basic proposition to be as follows:

"The holding of the majority today constitutes an unlawful delegation to the police of the plenary duty of the courts to so determine whether there is probable cause to believe the films obscene after all parties have had an opportunity to express and present to the best of their ability the Roth considerations. Although the seizure of the film in question was incident to an arrest, the arrest itself - and hence the seizure - is invalid. In

25. In the Albini case, several members of the Columbus Ohio Police Department entered the theatre, viewed segments of the film, arrested the manager and seized one copy of the film. In affirming Albini's conviction, the Ohio Supreme Court agreed with the rule of law adhered to by the Kentucky Court of Appeals in its judgment below.

The probable cause issue which precedes arrest is an administrative matter for the law enforcement officer or agency. See Ohio v. Shackman, 278 N.E.2d 61, 63 (May 20, 1971) where the court said:

"The procedure requested by the defendant would place the court in the position of a law enforcement officer or agency . . . in effect the defendant wants the court, in an adversary hearing to determine if there is probable cause to believe a crime has been committed and that an arrest should be made or evidence seized. This is not the function of the court." (Our emphasis.)

the absence of a prior judicial hearing to determine probable cause to believe the film obscene, the arrest is the product of the unlawful delegation of authority...."

Such an argument, however, was foreclosed by Gable v. Jenkins, 397 U.S. 592, 25 L.Ed.2d 595, 90 S.Ct. 351 (1970), relied upon by this Court in U.S. v. Reidel, supra, at page 355. ^{26/} The basis of the attack in the Federal District Court in Gable v. Jenkins, 309 F.Supp. 998, at 1001, was the appellant's claim that the Georgia statute was "unconstitutional" in that it did not provide for a prior judicial hearing before arrest. In Gable, the Federal District Court noted that any question as to the admissibility of illegally obtained evidence, seized incident to an arrest, was an independent question which was unrelated to the adversary hearing issue and that, where a prosecution under the state statute

26. See also Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288, 296-297, affirmed by this Court in New York Feed Co. v. Leary, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 817; Gornto v. Georgia, 178 S.E.2d 894, 896 (Dec. 3, 1970), cert. den. 402 U.S. 933, 28 L.Ed.2d 868, 91 S. Ct. 1525 (Apr. 26, 1971); U.S. v. Fragus, 428 F. 2d 1211 (5th Cir.). Compare the contrary analysis of Milky Way and Fragus in New York v. Morgan, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971) and Johnson v. City of Rochester, Minn., 197 N.W.2d 244, 246 (Apr. 28, 1972).

could be "based on other legally obtained evidence," an adversary hearing was not necessary.

It seems obvious from Gable v. Jenkins, that it would have been possible for the State of Kentucky to prosecute Roaden and avoid the "adversary hearing" issue by the simple expediency of making the arrest without seizing the ^{27/} film. Under that strategy, the prosecuting attorney, however, would have had to bargain away the use of autoptical evidence (the film) during his case in chief, for the more expedient testimonial evidence of Phelps as to what he saw depicted on the public screen and heard at the time of the arrest. ^{28/} It should be noted in this regard

27. Several prosecutors, in attempting to avoid the "adversary hearing" hurdle, have abandoned the use of autoptical evidence in favor of the more expedient testimonial evidence and other combinations. See Calif. v. Goulet, 98 Cal. Rptr. 782 (Oct. 28, 1971), Calif. v. Enskat, 98 Cal. Rptr. 646 (Sept. 21, 1971), Bryers v. Texas, 480 S.W.2d 712 (May 31, 1972), Longoria v. Texas, 479 S.W.2d 689 (Feb. 16, 1972). Respondent submits that for this Court to fashion a rule which would make autoptical evidence less available would be a step backward in the advance of police science and the search for truth. See Perkins, Elements of Police Science, referred to in Point IC, infra, at page 91.

28. See footnote 8. See also New York v. Morgan, 326 N.Y.S.2d 976 (Sept. 2, 1971) where a New York police officer paid \$5.00 admission fee to the Metropolitan Theater on 14th Street and viewed a film entitled "Anna's Banana", which ran 20 minutes and depicted the following, at p. 978:

(This footnote is continued on the next page)

that when the Commonwealth gave an indication that it was proceeding in that direction, Petitioner's counsel, Mr. Harris, was quick to place the following "best evidence" objection (see Statement of Facts, supra, at page 14):

"Your Honor, I object to this defend-

"a female masturbating by use of a cucumber . . . fellatio and cunnilingus . . . followed by an explicit act of sexual intercourse, toward the end of which, the male withdrew his organ and ejaculated in full view on the screen." He arrested the defendant without a warrant but did not seize the film. Judge Ringel denied the motion to dismiss, calling the subject matter as described "autoptically obscene" and holding, at page 980: "where probable cause exists to arrest for displaying an alleged hardcore motion picture film to the public an arrest without a warrant is lawful. There is no need for prior judicial scrutiny to validate such an arrest"

For a reply to Judge Ringel's and Justice Stewart's subjective "I know it when I see it" low watermark, see Federal District Judge Pettine's opinion in U.S. v. 50 Magazines, 323 F.Supp. 395 at 402:

"It is not an overstatement to say that one's own tastes, values and standards have been molded by a set of stimuli which are unique to him and to his cultural milieu, and those standards inevitably influence one's particular judgment as to what constitutes hard-core pornography" (Our emphasis.)

Amicus submits that the average American - yes, even a policeman - does know "lewdness" when he sees it. "Lewdness," after all, is what we have been talking about for 15 years, is it not? See Alberts v. Calif., 354 U.S. 476, 488; and Justice Harlan, concurring in Alberts v. Calif., at 501-503, and dissenting in Lee Art. Theatre v. Virginia, 392 U.S. 636, at 638.

ant) describing it because the film itself is the best evidence. Mr. Phelps, of necessity, would only be giving his impression or opinion, and not finding facts"

Recalling this Court's advice in Roth-Alberts, supra, that it was the "universal judgment" of civilized nations that obscenity should be restrained, Amicus submits that the Kentucky Court of Appeals, as the highest court in that state, acted well within the scope of its authority and responsibility when it decided that an obscenity arrest did not call for an exception to the general rule expressed in Commonwealth v. Lewis, 217 S.W.2d 625, 626, 309 Ky. 276 (Feb. 1, 1949) that:

"(2) evidence discovered by a search of the person, or his belongings in his immediate presence, upon his being legally arrested, is competent and admissible; (3) that an officer may lawfully make an arrest . . . if the misdemeanor is committed in his presence - from which it follows that any evidence discovered or found by the officer arresting the misdemeanorant will be competent under rule 2, supra"

where Kentucky procedure permitted the defendant to contest the issue of probable cause as an ancillary matter in the criminal case by way of motion to suppress or restore, or in an independent civil action to restore the personal property. (See footnote 7.) Notwithstanding the utter confusion in this area, the Kentucky Court of Appeals' solution is the majority view at the present time. See Missouri v. Hartstein, 469 S.W.2d 329, 332-334 (Apr. 12, 1971), reversed on other grounds in Hartstein v. Missouri, ___ U.S. ___, 30 L.Ed.2d 539, 92 S.Ct. ___ (Dec. 14, 1971); Wisconsin v. Kois, 188 N.W.2d 467, 471 (June 29, 1971), reversed on other grounds in Kois v. Wisc., ___ U.S. ___, 33 L.Ed.2d 312, 92 S.Ct. ___ (June 26, 1972); Wisconsin v. O'Connell, 192 N.W.2d 201, 205-206 (Dec. 14, 1971); Ohio v. Albini, 31 Ohio St.2d 27, 28 (July 5, 1972). See New York v. Morgan, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971), and compare New York v. Heller, 277 N.E.2d 651 (Dec. 1, 1971); cf. Washington v. Rabe, 484 P.2d 917, 920 (Apr. 6, 1971) (affidavit and arrest warrant), reversed on other grounds in Rabe v. Washington, ___ S.Ct. ___, 31 L.Ed.2d 258, 92 S.Ct. ___ (Mar. 20, 1972); New Jersey v. Osborne, 285 A.2d 43, 46 (D.C.Ct. of Appeals, Dec. 10, 1971) (affidavit and search warrant);

North Carolina v. Bryant, 183 S.E.2d 824, 825 (Oct. 20, 1971) (affidavit and arrest warrant); U.S. v. Green, 284 A.2d 879, 882 (Dec. 20, 1970) (affidavit and arrest warrant); Scott v. Frey, 330 F.Supp. 365, 367, (E.D.La., N.Orleans Div., June 30, 1971) (affidavit and arrest warrant); contra, Johnson v. City of Rochester, Minn., 197 N.W.2d 244, 247 (Apr. 28, 1972); Colorado v. Harvey, 491 P.2d 563, 564 (Dec. 6, 1971); Glass v. 8th Judicial District, 486 P.2d 1180, 1181 (July 2, 1971). While the California rule is contrary when a particular class of motion picture film is involved, see Flack v. Municipal Court of Anaheim, 56 Cal.2d 981, 429 P.2d 192, 59 Cal.Rptr. 872 (July 3, 1967), the California procedure authorizes police officer affidavits in support of arrest and search warrants. See Calif. v. DeRenzy, 275 Cal. App.2d 380, 79 Cal.Rptr. 777 (Aug. 1, 1969), hearing denied by the California Supreme Court on Sept. 24, 1969. For an outline of the arrest procedure in Los Angeles County, see Federal District Judge Andrew Hawk's opinion in Schackman v. Arnebergh, 258 F.Supp. 983, 989-990 (Sept. 27, 1966).

It is Amicus' basic contention, that in deciding this question, this Court must also keep in focus the due process considerations which support

the Kentucky State Obscenity Statute and procedures herein employed. Such would include the universal verity that lewdness and obscenity are public nuisances which are abatable under the law, and the ethical values shares by this Nation as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. Adamson v. California, 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672 (Justice Frankfurter's concurring opinion). Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 470, 91 L.Ed. 422, 67 S. Ct. 374 (concurring opinion). In Solesbee v. Balkom (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, reh. den. 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

"embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to

be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can often be detected from the practices in the states. He illustrated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons who become insane while under sentence of death." The relevant historical facts under consideration encompass this Nation's ethical values, as set forth in the well-knit pattern of city, state and federal laws, relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.) Those values

exist for the benefit of the family unit which is at the very core of government in our Judeau-Christian culture. See also footnote 29.

5. Sheriff Phelps Had "Probable Cause" To Make The Arrest.

(a) *Sheriff Phelps Had A Right and Duty Under The Kentucky Statutes To Make A Value Judgment As To Whether The Film Was Obscene.*

The public policy of the Commonwealth of Kentucky is strongly opposed to the public exhibition of obscene films and it was Sheriff Phelps' sworn duty to enforce that policy and uphold the ^{29/} law. See Point I, A 1 and Hosey v. City of Jackson, 309 F. Supp. 527 at 534, footnote 9 (Jan. 22, 1970), where the court said:

"The right and even the duty of police officers to seize the evi-

29. See footnote 21. Were this Court now (when hard-core pornography is so rampant) to apply its reasoning in earlier mass seizure and prior restraint cases, such as Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961) and A Quantity of Books v. Kansas, 378 U.S. 205 (1964) (when the presence of obscenity of a lesser degree was only beginning to be felt) it would be guilty of fundamental error, for it would run contrary to the basic truth that this Nation was not constructed in a moral vacuum. The possibility of such a basic philosophical error is suggested in the recent dictum appearing in the last paragraph of the majority opinion in U.S. v. Reidel, 402 U.S. 351, 28 L.Ed.2d 813, 818, 91 S. Ct. 1410 (May 3, 1971) and is epitomized by the last paragraph thereof, reading "Roth and like

dence which was the very means or vehicle of the commission of a crime committed in the officers' presence is not, in this Court's opinion, affected by the holding in *Chimel*. . . ."

The record shows, that nine year veteran Sergeant Phelps, Pulaski County's chief law enforcement officer, instructed his deputy, James Strunk, to keep an eye on the movies at the 27 Drive-In Theatre and that thereafter, Deputy Strunk viewed "Cindy and Donna" for about 30 minutes from the road outside the drive-in and saw the part "where the girls were loving." The following night Sheriff Phelps in company with the prosecuting attorney for the district paid the admis-

cases pose no obstacles to such developments." Amicus submits that the contrary holds true and that there is, as a matter of law, an inherent civil right which inheres in each citizen by virtue of his national citizenship in this Judeau-Christian Nation, to be free from the unnatural and debasing influence of hard-core pornography, such as was encountered by the Punkle family in the *Hughes* case (see footnote 42) -- at least, that is an advantage which Amicus understood to flow from our heritage, the Nation's obscenity laws and the decision handed down by this Court in *Roth v. U.S.*, 354 U.S. 476, 485 (1957) on the "universal judgment that obscenity should be restrained." See also Justice Harlan's views in *Roth v. U.S.*, *supra*, at 508 re the federal role where hard-core pornography is found.

sion price and entered the Highway Drive-In Theatre where they viewed the entire film.^{30/} Thereafter, Sheriff Phelps proceeded to the projection booth where he arrested the Petitioner, who was operating the projector, whom he also recognized as the manager of the drive-in.

Whether Sheriff Phelps' arrest of the petitioner without a warrant is constitutional depends upon whether or not at the time of the arrest he had "probable cause" to make the arrest on the obscenity charge. That "factual" issue depends upon two factors (1) the nature of the film itself - the autoptical evidence, which was the subject of the arrest, and (2) the capacity of a peace officer to evaluate the obscenity of the film in light of the Roth standards and his personal observations. See Schmerber v. Calif., 384 U.S. 757, 769, 16 L.Ed.2d 908, 918, 86 S. Ct. 1826, (June 20, 1966). If it was that brand of pornography which Justice Stewart defined and describes in subjective terms as "I know it when I see it" or that type which several

30. At least one court has said that in order for the misdemeanor to be committed, "in the presence" of the officer so as to authorize a warrantless arrest, the peace officer must see the entire film. See Cambist Films, Inc. v. Duggan, 298 F.Supp. 1148 at 1152 (Apr. 28, 1969).

jurists have called "obscene per se,"^{31/} the film could be said to be at one end of the obscenity spectrum; if it is of a less offensive nature, the autoptical evidence may not speak so loudly, and the film would be somewhere else along the spectrum. To the extent that the capacity

31. The test for obscenity per se is stated in Morris v. United States, 257 A.2d 341 (Dec. 2, 1969):

"If reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case in chief need not offer any evidence of national community standards."

See also Wilhoit v. U.S., 279 A.2d 505, cert. den. 30 L.Ed.2d 546 (Dec. 14, 1971) (Douglas would grant cert. and set the case for argument); Mitchum v. State of Florida, 251 S.2d 298 at 301 (Aug. 12, 1971); U.S. v. Womack, 111 U.S. App. D.C. 8, 294 F.2d 204, cert. den. 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed.2d 822 (Mar.27, 1969); U.S. v. Wild, 422 F.2d 34 (Oct. 29, 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, rehrg. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720 (June 21, 1971); Mitchum v. State of Florida, 244 S.2d 159, 160 (Jan. 26, 1971); Collins v. State Beverage Dept., 239 S.2d 613, 616; Marks v. State of Florida, 262 S.2d 479 (May 23, 1972); Kaplan v. U.S., 277 A.2d 477 at 479 (May 10, 1971); Illinois v. Ridens, 282 N.E.2d 691 at 695 (Mar. 21, 1972); State of Minn. v. Getman, 195 N.W.2d 827 at 829 (Mar. 17, 1972); Justice Herndon dissenting in Harmer v. Tonylyn Productions, 100 Cal. Rptr. 576, 579 (Mar. 2, 1972); United Theatres of Florida v. State ex rel Gerstein, 259 S.2d 210, 212 (Feb. 15, 1972); U.S. v. Miller, 455 F.2d 899 at 902 (Mar. 22, 1972). See also Justice Sullivan speaking in Boreta Enterprises, Inc. v. Dept. of Alcohol Beverage Control, 2 Cal. 3d 85, 84 Cal.Rptr. 113, at 123 (Feb. 26, 1970).

of the person evaluating the film may be in issue, Petitioner erroneously assumes that a peace officer is relegated to a classification which is incapable of making a value judgment in the entire spectrum of such potential evidence, which ^{32/} will satisfy the test enunciated in Roth v. U.S., 354 U.S. 476. The argument which Petitioner urges herein was recently made to the Ohio Supreme Court and rejected in Ohio v. Albini, supra, where Justice Herbert, speaking for six of the Ohio Supreme Court Justices, said as to that ^{33/} proposition:

32. There is nothing inherently wrong with a state policy which authorizes a peace officer to make a warrantless arrest for obscenity so long as the procedural law permits a person so arrested to contest the "probable cause" determination either in an ancillary proceeding in the criminal prosecution or in a separate civil action. See Footnote 7, supra, at page 11, and text at Point IB2, infra, at page 85.

33. The case for the police officer was also stated by Common Pleas Judge Pryatel in Ohio v. Dornblaser, 267 N.E.2d 434 (Mar. 8, 1971), at 438:

"Upon review of the authorities, we cast our lot with those who hold that the requirement to conduct adversary hearings on 'obscene' films offered for sale before an arrest or prosecution can be effected is unnecessary and that the absence of such a hearing affects neither the validity nor the legality of the arrest or the indictment that followed.

"The adoption of appellant Albini's contention in this regard would emasculate the efforts of the General Assembly to discourage those who would profiteer through the commercial exploitation of sex by publicly exhibiting motion picture film, the dominant theme of which appeals to a prurient interest in sex"

In a footnote at page 28, the Court noted:

"2. . Essentially, it appears to be the contention of counsel for appellants

"To hold that the seller, of the films sought to be suppressed here, should be accorded adversary proceedings before arrest and indictment can be accomplished is to scoff at our obscenity laws and the public they were passed to protect. Nor do we believe that the First and Fourteenth Amendments of the Constitution need be construed to forge a ring of protection around such purveyors of pornography. We see no constitutional reason why these 'salesmen' should be given the consideration of prior adversary hearings for we find no abridgement of their rights or privileges by such denial. It is our opinion that the law should not erect another barrier for the police to hurdle in their already difficult responsibility to curb obscenity and that these purveyors should not be given a prior hearing to ascertain whether their product is sufficiently hard-core pornography to warrant prosecution. Therefore, the Motion to Suppress for lack of prior adversary hearing is overruled."

that two trials, each with a full right of appeal, are required for final conviction of an offense of this nature, regardless of whether the facts would otherwise constitute obvious proof of guilt; first, a hearing to determine whether the officer may be permitted to make an arrest, file charges and take physical custody of the obscene material for evidentiary purposes and, second, the criminal trial itself.

In response to a question posed during oral argument of this cause, appellant's counsel estimated that a final adjudication of the first hearing in cases such as the one at bar would require at least two years. Moreover, just how the physical evidence could be adduced at this first hearing without prior 'seizure' thereof is not clear since we cannot assume that a potential criminal defendant would freely volunteer to supply such"

- (b) *Sheriff Phelps Was Entitled To Rely Upon The Legal Counsel of the Prosecuting Attorney Who Attended The Movie With Him.*

Independent of the issue re the capacity of a peace officer (in this case, the Sheriff) to make value judgments as to obscenity crimes, the record demonstrates that other "facts and circumstances within the arresting officer's knowledge and of which he had reasonable trustworthy information . . . existed which were sufficient to warrant a man of reasonable caution in the belief that an offense had been committed." Draper v. U.S., supra. In the case herein, Sheriff Phelps, viewed the film in its entirety in company with the County Prosecutor. It is reasonable to infer from the present state of the record that the latter official was present at the drive-in for the specific purpose of giving legal assistance to Sheriff Phelps on the obscenity issue.

- (c) *Petitioner Having Conceded Factual Obscenity As To The Criminal Charge Is Precluded From Denying That "Probable Cause" For The Arrest Existed.*

The state of the record on this appeal is unusual in that the Petitioner, both at the trial and on appeal to the Court of Appeals of Kentucky (and in his brief herein) makes no claim that the

film "Cindy and Donna" is not obscene. Further, the defense counsel's arguments to the jury (see Statement of Facts, supra, at footnotes 10 to 14) are an admission of "Probable" obscenity which Amicus submits, in this case, is equivalent to "Probable cause."

While the film is not before this Court on its merits, that fault is of the Petitioner's making. The record is, however, showing (1) The jury verdict, (2) the trial summation of defense counsel, which concedes obscenity, and (3) the failure to attack the jury finding on appeal. Where "probable cause" depends upon the nature of the subject matter, which was viewed by the Sheriff and Prosecutor at the time of the arrest, and it is conceded after trial on the merits that such subject matter is sufficient to establish guilt of the charge, it must follow, as a matter of law, that the evidence was also sufficient under traditional concepts, to establish "probable cause" for the arrest.

- B. Petitioner Was Not Deprived of Due Process When The Positive Print Used by Petitioner to Project The Audio Sound and Visual Images Was Seized Incident to the Arrest as Evidence Bearing on the Charge.**

1. Legitimate Interests of Society Require That The Autoptical Evidence Used To Project the Audio Sound and Visual Images On the Screen Be Preserved Against Alteration or Destruction.

Society has a legitimate interest in suppressing crime and detecting criminals which requires (1) that evidence of the crime, namely, the motion picture projection print, be preserved against alteration or destruction; (2) that the motion picture projection print, as autoptical evidence, be favored over the testimonial evidence of law enforcement as to what was seen and heard, inasmuch as faulty judgment resulting from disability in one or more of the senses, may draw in question the integrity of the later, and (3) that the deterrent effect of the criminal laws, which attends public recognition of a peace officer's right to take immediate possession of the instrumentality of crime (the motion picture projection print) as evidence, should be given great weight in evaluating defensive tactics which frivolously draw that right in question. In a parallel consideration in Breithaupt v. Abram, 352 U.S. 432, 439, 1 L.Ed.2d 448, 453, 77 S.Ct. 409 (Feb. 25, 1957), this Court, in affirming the right of state authorities to extract blood in a warrantless seizure from an unconscious person so as to prove him under the influence of alcohol and responsible for an auto accident, held:

"As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions." (Emphasis ours.)

(a) *The Emergent Condition Requires That The Alleged Instrumentality Of The Crime Be Preserved In Its Challenged Form.*

The same emergent condition that was said to exist at the time of the arrest and seizure of a blood sample in Schmerber v. Calif., 384 U.S. 757, 16 L.Ed.2d 908, 919, 86 S.Ct. 1826 (June 20, 1966) presents itself as to evidence in the form of a motion picture projection print when there is an arrest for the exhibition of an obscene film.

It has been said that the film itself is "in-^{34/}dispensable evidence." "Indispensable evidence is that without which a particular fact cannot be proved," Witkin, California Evidence, Copyright 1958, at page 5. It is a well known fact that sexually oriented motion picture films are often altered by adding or deleting scenes. The absolute

34. In Cambist Films, Inc. v. Duggan, 298 F. Supp. 1148, 1152, footnote 4 (W.D. Pa.) (Apr. 28, 1969), Federal District Judge Dumbauld pointed to the need for the immediate preservation of evidence:

"The retention of one print as evidence is reasonable and not oppressive. In view of the fact that the film itself is perhaps the best evidence, or at least indispensable evidence, on the question as to its nature, and of the fact that films are often cut or altered for showing at different theatres, it is important to establish the exact content of the film as exhibited on the occasion giving rise to the prosecution"

necessity of retaining an exact copy of the content of the film as shown at the time of the commission of the alleged offense is obvious. To require that the film be brought into court or that arrangements be made for a private showing provides no guarantee against cutting or alteration ^{35/} in the interim.

To instruct a state that its police officers or prosecutors, after viewing an obscene film, may not make an immediate arrest, but must leave the theatre and report its contents to a judicial officer, would completely frustrate the state's legitimate right to prohibit the public showing of

35. During 1970, Amicus and others assisted the City of Atlanta in a civil action asking for an injunction against the film, "Sandra, the Making of a Woman." On Oct. 16, 1970, the film was viewed by Atlanta, Georgia, law enforcement and on Oct. 21, 1970, a court order was issued and served on the theater, requiring them to bring the film before the court. When the film was finally produced on Nov. 6, 1970, another version was tendered to the court. At least 500 feet had been cut from one of the scenes (5 min.), as was later proved to the court, using a film continuity, the still photographs of which had been taken by law enforcement on Oct. 16, 1970. An attempt, thru depositions, to pin down the responsibility for the cutting was unsuccessful. The trial court finding that the film was obscene was affirmed by the Georgia Supreme Court. The matter did not go beyond the Georgia Supreme Court. Were this Court to uphold the claim of Petitioner herein, the already difficult task of getting an obscenity case to trial would be further complicated by an additional issue: "Which film was shown on the date in question?"

36/

obscene films.

36. In Hosey v. City of Jackson, 309 F. Supp. 527, 534, 535 (S.D.Miss., Jackson Div.) (Jan. 22, 1970) Federal District Judge Nixon, speaking for the majority of a three-judge Federal District Court, analyzed the social needs in the light of the evidentiary problems present in such cases:

"The film itself is unquestionably the best evidence in any criminal prosecution for the public showing of an obscene movie. More importantly, however, it is a well known fact that moving picture films may be and often are altered by adding or deleting one or more scenes for showing at a particular theater or exhibition. The absolute necessity of retaining an exact content of the film as shown at the time of the commission of the alleged offense is obvious. . . .

"This Court is of the opinion that any judicial hearing prior to the seizure of an allegedly obscene film at the time of exhibition would completely frustrate the purpose and operation of the Mississippi statute prohibiting the exhibition of obscene movies. Certainly, if a prior judicial hearing were required, it would be necessary for the hearing judge to view the film as exhibited on the occasion giving rise to the prosecution. To require a judge to proceed from one theater to another or attend numerous showings to another or attend numerous showings of a film at a particular theater with the mere possibility of viewing an obscene version is untenable. Furthermore, to require that the film be brought into Court or that arrangements be made for a private showing of the film in a particular theater provides no guarantees against the cutting or alteration of the film prior thereof. Finally, if police officers, after viewing an obscene film, were required to leave the theater in order to obtain a judicial determination on the question of obscenity by merely reporting the contents to the proper judicial officer, a judicial deter-

(This footnote is continued on the next page)

How else may the state obtain the indispensable evidence? ^{37/} In most cases, the state cannot

mination under such conditions would not only be extremely difficult and subject to error, but by the time a seizure could be made, the film might be altered or even shipped to another theater or location. This would be particularly true in so-called 'quickie movies' or 'premiere performances,' the same or any versions of which might never again be shown at the same location. A procedure which is not unreasonable and not oppressive should not be condemned so as to completely frustrate a state's legitimate right to prohibit the public showing of obscene movies.

"The necessity of the seizure of an obscene movie at the time of showing cannot be compared to the seizure of obscene literature because books or magazines can always be purchased and brought before a court for a judicial hearing before a seizure is accomplished. Furthermore, literature does not enjoy the same possibility of easy deletion and alteration as is the case with a motion picture. Several movements of the cutter's hand can completely change the content of an exhibited obscene version of a movie and thereby eliminate any successful criminal prosecution."

37. In Bazzell v. Gibbens, 306 F. Supp. 1057, (E.D. Louisiana, Baton Rouge Division) (Dec. 9, 1969), Chief Judge West made the following observations as to the interests of society in such matters, at page 1060:

"To deprive the District Attorney or the State of Louisiana of the right to seize evidence pursuant to a search warrant issued on the basis of probable cause, and to preserve that evidence intact for use during future criminal proceedings, would be to effectively deny the state the right in a case such as this to prosecute at all under a statute already declared to be constitutional"

purchase a copy of the film to be used in evidence. Even were this possible, it would be an almost insurmountable task to prove at the trial that the purchased copy is identical to the one which is named as being the instrumentality of the crime.

If this Court were to make an exception and, where motion picture films are concerned, limit the right of law enforcement to seize the instrumentality of the crime at the time of the arrest, it would be opening another Pandora's Box and inviting another long line of litigation similar to the last 4 years involving the adversary hearing, which followed Lee Arts Theatre, Inc. v. Virginia, 392 U.S. 636.

and at page 1061:

"The State could not purchase a copy of the film to be used as evidence as it could in the case of most printed publications. It is absolutely necessary for the State to have a copy of the film in order to properly enforce the statute involved. How else but by seizure could it obtain this indispensable evidence? It would make no difference insofar as First Amendment rights are concerned whether the possession of such evidence is obtained by the State by virtue of a seizure made pursuant to a search warrant properly issued or by virtue of a court order directing the defendant to deliver the film to the State so that it might be used in preparation for trial. In either case the purpose of the possession of the film by the State is to preserve the minimum amount of evidence required to properly prepare the State's case rather than to prohibit the further dissemination of the information contained in the film prior to trial."

In discharging its duty to "preserve" evidence, law enforcement rarely finds itself faced with identical fact situations.^{38/} If this Court fashions a new

38. In discharging its duty to "preserve evidence, law enforcement often finds itself faced with fact situations which are "just a little different." In California v. DeRenzy, 79 Cal. Rptr. 777, 781 (Aug. 1, 1969), hearing denied by the California Supreme Court on Sept. 24, 1969, Justice Elkington of the Court of Appeal, First District, Div. 1, pointed out some of the unusual problems which have no ready answers, but which will be affected by this Court's ruling herein:

"De Renzy's argument in the Superior Court, not emphasized here, that the police nevertheless conducted a mass seizure since they took both nonobscene and obscene material on the same reels, is obviously without merit. Any police attempt, at the place of seizure, to edit and cut hundreds, perhaps thousands, of feet of film without expertise or proper equipment, would be a far greater threat to constitutional and property rights, than was the conduct complained of here DeRenzy has mentioned, without particularly advocating, the sometimes suggestion that in the absence of an adversary hearing, a magistrate should at least view allegedly obscene film before authorizing a search warrant. No way has yet been pointed out how this is to be accomplished. Must the magistrate at the beck of a policeman travel to the place of exhibition? If so, should the visit be clandestine or open? The former would be unfitting; a judge should not assume the role of an undercover investigator. If the magistrate makes his presence known, what reasonable assurance exists that the exhibitor will show the film, thus perhaps aiding in his own conviction. No means appear by which he may be compelled to bring his film to the magistrate. And even if such a viewing could be arranged before seizure of the film, there would still be no prior adversary

rule, it must then be prepared to sit in judgment on the refinements to the new rule.

The "chilling effect" so easily claimed by defense counsel, is more often than not, imaginary. To honor such arguments in a challenge to

hearing as demanded here by DeRenzy, and required, in proper cases, by Books, Marcus and Metzger. (Their Italics.)

In upholding the seizure of two films taken under an ex parte search warrant in New York v. Steinberg, 304 N.Y.S.2d 858 (Oct. 2, 1969), Judge Pollack made the following observations on the problems which attend the marshalling of evidence in motion picture obscenity cases in New York City:

"The state is entitled to prosecute people who exhibit motion pictures which are obscene. In order to prosecute for obscenity they must first seize the films since the best evidence of whether the picture is obscene or not is the picture itself.

"Before the films were seized, Judge Burchell and Judge Wein, at the request of the District Attorney, viewed all the films and trailers at regularly scheduled performances in the Capitol Theatre and then signed the search warrants

"This is not a massive seizure of books, but a seizure of motion pictures. In the Court's opinion it is less practicable to hold a preliminary judicial adversary proceeding in a case involving motion pictures than in a case involving books. To require a full adversary judicial proceeding prior to the seizure would be unreasonable, and in many cases impractical since by the time a hearing could be arranged after due notice to the potential defendant the film might no longer be in the possession of the potential defendant."

the public interest which entrusts a peace officer with the right to take immediate possession of the instrumentalities of alleged crimes, when it is clear that no supportive facts exist therefor, ^{39/} undermines the operations of the criminal law.

39. In U.S. v. Pryba, Herman L. Womack, Poto-
mac News Co., 312 F. Supp. 466, 468 (Dist. of Co-
lumbia) (Apr. 2, 1970), Federal District Judge
Pratt, in evaluating such defense tactics where
an affidavit alleged "the films depict a man and a
female engaged in sexual intercourse, and various
sexual activities by males and males, and males
and females," made the following comments:

"Additionally, none of the cases cited by
defendants address themselves to the im-
practicality, not to say impossibility,
of holding a prior adversary hearing in
the situation at bar where obscene mater-
ials surreptitiously placed in the stream
of interstate commerce are fortuitously
discovered by a civilian employee. In
such circumstances, officers, after the
parcel has been repacked, sent on its way;
and traced to its destination, should not
be required to make the futile gesture of
requesting that copies be made available
for viewing by a judicial officer prior
to the institution of criminal proceedings.
That a defendant would cooperate voluntar-
ily is unlikely particularly in a case
where hard-core obscenity is involved.
Moreover, to believe that the same films
would be proffered to the court in the
same condition as when first viewed by
the employee is to blink reality. To re-
quire the prosecution to institute civil
proceedings or to issue a subpoena duces
tecum would be equally impractical and
would render the enforcement of 18 U.S.C.
§ 1462 virtually impossible. Defendants
have suggested no practical method where-
by a prior adversary hearing in the in-
stant case could have been achieved.

"Finally, the minimal public depriva-

(b) Autoptical Evidence (the Motion Picture Projection Print) Is To Be Favored Over Testimonial Evidence of Peace Officers As To What They Saw or Heard Exhibited On The Motion Picture Screen.

Defense Counsel Harris was quick to object that the motion picture projection print was the "Best Evidence," which prevented Sheriff Phelps from giving testimonial evidence as to what he saw and heard at the Drive-In (Statement of the Case, supra, at page 14). The rationale behind the "Best Evidence" rule is stated in Model Code of Evidence, American Law Institute, Rule 602. Comment at page 300 to be: (see also McCormick on Evi-

tion and any chilling effect on the exercise by defendants of constitutionally protected rights were diminished by the Government's proffer of an adversary hearing on the issue of obscenity attempted to be held only five days after the seizure. Had these materials been non-obscene, such a determination could have been promptly made following the seizures and the materials returned to defendants for such public or private display as they desired. Defendants waived the opportunity to participate in this hearing, however, and with it gave up the opportunity immediately to require the prosecution to demonstrate that these materials were obscene and therefore unfit for public consumption. The apparent nature of the films involved supplies convincing reasons for the defendants' disinterest in having such a hearing.

"In short, we hold that an adversary hearing on the issue of obscenity prior to seizure was not required under the facts of this case."

dence (1954) at page 410; 4 Wigmore on Evidence (3rd Edition, 1940, Section 1179):

"Slight differences in written words or other symbols may make vast differences in meaning; there is great danger of inaccurate observation of such symbols, especially if they are substantially similar to the eye. Consequently there is opportunity for fraud and likelihood of mistake in proof of the content of a writing unless the writing itself is produced. Hence it should be produced if available."

If the trial judge's ruling that, "I am going to permit him to tell what the film was about as a general proposition, but not to go into full details, because if the picture is exhibited to the jury, they can see the film themselves" was based upon the "best evidence" objection, then the rationale acknowledged by this Court as the basis for its permitting blood samples to be taken in drunk driving cases has similar application here, where the Kentucky Court, in developing workable rules governing arrests and seizures based on the principles of reasonableness under the circumstances of the case, Ker v. California, *supra*, saw fit to favor autoptical evidence over the testi-

monial evidence of Sheriff Phelps as to what he heard and saw.

At least one other jurisdiction has specifically ruled that motion picture films constitute "writings" which, under the California Evidence code, require their production at the trial under the "Best Evidence" rule. In California v. Enskat, 98 Cal. Rptr. 646, 647, 20 Cal. App.3d. Supp. 1 (Sept. 21, 1971) the Appellate Department ruled that a proper foundation must be laid before secondary evidence would be admitted.^{40/} In Califor-

40. In Enskat, the Appellate Department held as follows:

"That there appears to be a 'motion picture' does not alter the fact that a series of single pictures on the film strip, each one a 'writing' is casting an image on the screen.

"Respondent argues, however, that it is not the film, but these light images on the screen, that constitute the offense of exhibiting an obscene motion picture. Respondent argues that as this moving image is unrecorded, it cannot be a writing, and therefore is not subject to the best evidence rule. This argument ignores the essential fact that the moving image is merely the consequence of casting a writing (the film) through a machine. Without the projector and the filmstrip, no moving image is cast at all. The contents of the moving image, 'evanescent' or not, is totally dependent upon the content of the filmstrip. Just as it is better for the trier of fact to read a document than have it described, it is better for the trier of fact to see a movie than have it described. The policy considerations upholding the rule for written documents apply with full force to movies as well"

nia v. Goulet, 98 Cal. Rptr. 782, 783, 21 Cal. App. 3d. Supp. 1 (Dec. 7, 1971), that same Court recognized, in applying the best evidence rule in a motion picture obscenity case that, in some cases, secondary evidence may be insufficient on its face and require its rejection.^{41/}

The indispensable nature of such autoptical evidence, being the very instrumentality of the

41. In Goulet, the Appellate Department ruled:

"We return to the major ground of dismissal, that the film in question must be available as evidence, and that verbal description of the contents (or 'secondary evidence') is not admissible. Although this appears to be a case of first impression in this state in the obscenity area, the use of secondary evidence in criminal cases generally has long been recognized (People v. Rial (1914), 23 Cal. App. 713, 139 P. 661; People v. Chapman (1921), 55 Cal. App. 192, 203 P. 126; People v. Powell (1925) 71 Cal. App. 500, 236 P. 311). Such case is also expressly recognized in new Evidence Code (Section 1503) subsection (a).

"To be sure, there may be cases where it is difficult to establish the contents of a film or book by oral secondary showings, particularly where its obscenity may be borderline in character. There may also be cases where the secondary showing may be insufficient on its face and require a court to reject it in its entirety. But we do not reach issues as to the sufficiency of the secondary evidence offered, the sufficiency of the foundation laid for its admission, or the extent to which any common law basis for the use of secondary evidence has been expanded or contracted by the Evidence Code"

crime, is obvious. In a number of cases it has been shown that, unless such evidence is preserved, the prosecution may fail. See Bryers v. Texas, 480 S.W. 2d 712 (May 31, 1972) where the Court reversed an obscenity conviction based upon testimonial evidence only, saing at 718:

"In conclusion we hold that the evidence is insufficient to sustain an obscenity conviction unless (1) the alleged obscene matter, in this case a film, is introduced into evidence, or (2) the defendant expressly and affirmatively stipulates or admits that the material is obscene under the standards stated in Article 527, Section (A)."

In Longoria v. Texas, 479 S.W.2d 689 (Feb. 16, 1972) a jury assessed a fine of \$1,000.00 and six months in jail for exhibiting four films in Corpus Christi, Texas. At the trial two police officers described several scenes from the films, which showed nude bodies of men and women, acts of sexual intercourse, acts of oral sodomy, other sexual activity and a limited amount of conversation. Neither the films nor any portions or representations of them were introduced into evidence. The Court of Criminal Appeals of Texas reversed on the grounds that the testimony of the officers describ-

ing the motion pictures was insufficient evidence for the jury, or the Appellate Court, independently, to determine obscenity. In Longoria v. Texas, the Court noted that in Brown v. State of Texas, 167 Tex. C.R. 351, 320 S.W.2d 670, a verdict by a jury which had seen the film was reversed on appeal where the record contained nothing to show what the jury saw and what the evidence was.

Amicus submits that to prohibit the seizure of autoptical evidence at the time of the arrest would be contrary to general principles of the law which prefer its use - more so, when such is also the very instrumentality of the crime. To do so would impede the marshalling of the most trustworthy, if not indispensable evidence, and would generally frustrate criminal prosecutions.^{42/} In this regard Federal District Judge Nixon, writing for the majority in Hosey v. City of Jackson,

42. Suppose a case in which reliable information establishes that an adult male has exhibited "photographs and books (entitled 'Guidebook To Sexual Positions Between Consenting Adult Males by J. J. Proferes') with pictures of nude men performing sodomy and unnatural and perverted sex acts" to a 13-year old boy, immediately after which he performed an act of oral sodomy on the 13-year old, would the police be authorized to seize the book as evidence of the crime, either under a search warrant or incident to his arrest at his home, or would they first have to afford him an adversary hearing? See Hughes v. Maryland, 287 A.2d 299, 308 (Feb. 16, 1972). If not there, why then here? See footnote 29, supra, at page 60.

309 F. Supp. 527 at 534, footnote 9 (Jan. 22, 1970), vacated and remanded on jurisdiction in 401 U.S. 987, 28 L.Ed.2d 525, 91 S.Ct. 1221, noted as follows:

"The right and even the duty of police officers to seize the evidence which was the very means or vehicle of the commission of a crime committed in the officer's presence is not, in this court's opinion, affected by the holding in *Chimel*. To prohibit the seizure of such evidence under these circumstances would completely frustrate criminal prosecution, and necessarily the arrest for a crime witnessed by the arresting officers"

- (2) The Seizure Incident To The Arrest Was Within The Reach Authorized by *CHIMEL v CALIFORNIA*.

Searches incident to lawful arrest are justified notwithstanding the absence of a search warrant in order to prevent the alteration or destruction of evidence of the crime. In *Preston v. U.S.*, 376 U.S. 364, 367, 11 L.Ed.2d 777, 780, 84 S.Ct. 881 (Feb. 25, 1954) this Court noted:

"The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other

things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime - things which might easily happen where the weapon or evidence is on the accused person or under his immediate control." (Our emphasis.)

See also Chimel v. Calif., 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (June 23, 1969), where this Court said at page 694:

"When an arrest is made . . . it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab . . . evidentiary items must, of course, be governed by a like rule There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control - construing that phrase to mean the area from within which he might gain possession of . . . destructible evidence . . ." (Our emphasis.)

It is clear that the warrantless search of the projection booth incident to Petitioner's arrest was within the reach authorized by Chimel v. California, supra. Petitioner was in the booth from which the audio and visual projections originated, and at the time he was arrested was himself in possession of the motion picture film which was seized.

Further, it is not a "search" where an officer observes contraband which is clearly visible from a place where an officer has a right to be.

Nichols v. Commonwealth of Kentucky, 408 S.W.2d 189. A search warrant is not necessary, where the object sought by search is visible, open and obvious to anyone within reasonable distance, employing his eyes. Ferrell v. Comm. of Ky., 264 S. W. 1078, 264 Ky. 548, or where the objects sought are visible, open and obvious to anyone, who even casually looks around. Foster v. Commonwealth of Kentucky, 415 S.W.2d 373, cert. den. 388 U.S. 914, 18 L.Ed.2d 1355, 87 S. Ct. 2128.

Granted the law's preference for search warrants, a state is not required to resolve all such issues on the practicability of obtaining a search warrant. The Commonwealth of Kentucky was entitled to rely on this Court's express invitation to develop workable rules, governing arrests

and searches, based on the principle of reasonableness under all the circumstances of the case. Ker v. Calif., 374 U.S. 23, 33-34, 10 L.Ed.2d 726, 83 S.Ct. 1623.

There is nothing inherently wrong with a state policy which authorizes a peace officer to make a warrantless arrest for obscenity so long as the procedural law permits a person so arrested to contest the "probable cause" determination either in an ancillary proceeding in the criminal prosecution or in a separate civil action. See footnotes 7 and 22, supra; U.S. v. 37 Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (May 3, 1971); Johnson v. Commonwealth of Kentucky,

43. Twenty days elapsed between the time that Sheriff Phelps arrested the Petitioner and seized the film "Cindy and Donna" as the instrumentality of the crime and the return of the special verdicts of the jury that the film was obscene and that Petitioner had knowledge of the obscenity thereof when he exhibited the same. Such restraint as occurred here was clearly within the guidelines set down by this Court in U.S. v. 37 Photographs, supra, at 832:

"Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305(a) to require intervals of no more than 14 days from seizure of the goods to

475 S.W.2d 893, 894 (Dec. 17, 1971). See also the dissent of Justice White in Chimel v. Calif., 395 U.S. 752, 782-783, 23 L.Ed.2d 685, 89 S.Ct. 2034, 2051-2052, wherein he noted that, "In considering searches incident to arrest, it must be remembered there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search . . . and having been arrested, he will soon be brought into contact with people who can explain his rights An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search

the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court

"Of course, we do not now decide that these are the only constitutionally permissible time limits. We note, furthermore, that constitutionally permissible limits may vary in different contexts; in other contexts, such as a claim by a state censor that a movie is obscene, the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or between their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today." (Our emphasis.)

in a full adversary proceeding. " ^{44/} Justice Stewart's response to Justice White in Chimel at footnote 7 that, "one may initially question whether all of the states in fact provide the speedy suppression procedures the dissent assumes" provides no satisfactory answer for those states that do. This Court should bear in mind the very real interest the State of Kentucky and other states have in suppressing obscenity and maintaining high moral standards. On the strong legislative policy of the Commonwealth of Kentucky against obscenity, see Point I A 1, supra.

44. Consider the procedure adopted in North Carolina. North Carolina v. Bryant, 183 S.E.2d 824 (Oct. 20, 1971). On May 17, 1971, an arrest was made on Joe Bryant and others under an arrest warrant charging the sale of named books and magazines. In executing the arrest, certain materials were seized. The State immediately moved for an adversary hearing which was set for May 24, but continued to May 25th at the defendant's request. After the hearing the trial judge held the seizure incident to the arrest to be proper and ordered certain materials to be retained and others to be returned. On appeal, the Court of Appeals of North Carolina ruled that the trial judge's decision was in the nature of an interlocutory order which could not be appealed until after a final determination of the whole case.

C. Petitioner Was Not Deprived of Due Process When The Positive Film Print Was Admitted Into Evidence at The Trial.

Petitioner's motion to suppress the evidence, based upon Fourth Amendment principles, was properly denied. Further, by waiving a pretrial motion to restore the film print and conceding the obscenity of the film, Petitioner is now foreclosed from arguing First Amendment principles.

It is clear from the foregoing principles and authorities that the public policy requires that the positive film print which was used to project the images and sound, being the instrumentality of the alleged crime, be preserved intact and introduced as evidence for the consideration of the trier of fact in its determination on the issue of guilt or innocence. Whether as "best evidence" or as "indispensable evidence" the search for objective truth requires that law enforcement investigators ferret out and preserve the same so that the law may be honestly administered. In Elements of Police Science, copyright 1942, Foundation Press, Inc., Professor Rollin Perkins comments on the duties and responsibility of law enforcement investigators in such matters, at pages 44 and 50:

"It is impossible to give all of the

rules for conducting every variety of investigation which the police are called upon to make, but there are some rules which have general application. They are . . . 21. A search must be made for all clues to aid in establishing the fact that a crime has or has not been committed, as well as for evidence which will not only prove useful in identifying and convicting the perpetrator, but also aid in eliminating innocent suspects . . . 25. During the progress of the general survey, everything must be observed with maximum attention. A Chinese saying, 'The eyes see only what they look for, and look for what is already in the mind,' is particularly applicable in the field of investigation. . . 26. . . . In an important case recently tried, the omission of these details and the non-observance of important evidence almost resulted in the execution of an innocent person. . . 36. All movable evidence must be carefully wrapped or placed in suitable containers, sealed, and marked with the identification symbol with the following notations thereon: The

place from whence taken, the date and time, the names of witnesses to the act, the name or number of the report, and the name of the person who removed the evidence . . . 37. Every article taken must be handled and packed so that all characteristics will be preserved from the moment of collection until presented to the expert for examination or introduced by the investigator at the trial. All evidence must when presented in court show a complete chain of its custody from the time it was first taken into possession until presented as evidence. The courts have continuously held that evidence must be identified with the place of discovery, that it be uncontaminated, and unchanged in character. . . ."

(Our emphasis.)

The Commonwealth fully complied with all of the requirements of the law. During its case in chief, the Commonwealth attorney offered in evidence the positive film print which was seized and showed a complete chain of its custody from the time it was first taken into the possession of Sheriff Phelps at the time of the arrest until received in evidence as Exhibits 1 - 5 (see

Statement of the Case, supra, at Page 15).

This Court should take particular note of what occurred thereafter. The jury and Sheriff Phelps travelled to a remote spot where they viewed the film, after which they returned to the courtroom where Sheriff Phelps testified that he recognized the film which was shown to the jury as the same one he has seen at the Highway 27 Drive-In Theatre on Sept. 29, 1970. He failed, however, to connect up the evidence and account for the positive film print from the time it was received as evidence in the courtroom until it was shown to the jury at the remote spot. Upon questioning by the Court on its own motion, the record was made clear that the positive film print which was used to project the images and sound for the jury was the identical film print which was seized from Petitioner on the night of the alleged offense and, that therefore, the jury could accept the autoptical evidence which had been introduced, and need not rely upon the testimonial evidence of Sheriff Phelps which drew a comparison between what he had seen with the jury, and what he had seen at the Drive-In on the night of September 29, 1970.

II

THE PAST DECISIONS OF THIS COURT DO NOT SUPPORT PETITIONER'S CLAIM THAT THE DENIAL OF AN ADVERSARY HEARING PRIOR TO SEIZURE AMOUNTS TO A VIOLATION OF DUE PROCESS OF LAW.

Until this Court's per curiam reversals in May and June of 1967, ^{45/} the defense attorneys had never, in their wildest imagination, dreamt up enough courage to advance the arguments now made herein - i.e., that the failure to have an adversary hearing on the issue of the obscenity of a

45. On May 8, 1967, two obscenity convictions and one injunction were reversed: Redrup v. New York, 386 U.S. 767; Austin v. Ky, 386 U.S. 767; Gent v. Arkansas, 386 U.S. 767 (Inj.). On June 12, 1967, seventeen obscenity convictions and two injunctions were reversed: Keney v. N.Y., 388 U.S. 440; Friedman v. N.Y., 388 U.S. 441; Sheperd, Lewis and Bloomberg v. N.Y., 388 U.S. 444; Avansino, Sessa, Strombelline, Gaqqi and Costanza v. N.Y., 388 U.S. 446; Cobert v. N.Y., 388 U.S. 443; Ratner v. Calif., 388 U.S. 442; Schackman v. California, 388 U.S. 454; A Quantity of Books v. Kansas, 388 U.S. 452 (Inj.); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (Inj.); Books, Inc. v. U.S., 388 U.S. 449; Aday v. U.S., 388 U.S. 447; Rosenbloom v. Va., 388 U.S. 450; Mazes v. Ohio, 388 U.S. 453. The Court refused to render a decision on the film, "Flaming Creatures," Jacobs v. N.Y., 388 U.S. 431, and on the New York Statute imposing absolute liability where girlie magazines were sold to minors, Tannenbaum v. N.Y., 388 U.S. 439, ruling both cases moot. Only as to the film "Un Chant D'Amour" did the Court uphold an obscenity determination, and that by a 5-4 decision, Landau v. Fording, 388 U.S. 456. The Court also refused to review by habeas corpus the 30-day jail sentence of Wenzler for selling a girlie strip film, "First Fling," Wenzler v. Pitchess, 388 U.S. 912, as to which it had denied certiorari two terms earlier in Wenzler v. California, 377 U.S. 994 (June 22, 1964). Compare the Kentucky solution at Point IAl(a), supra, at page 44.

film, prior to arrest and seizure, amounts to a denial of due process. For an example of the standard defense tactic used prior to that time, see Schackman v. Arnebergh, 258 F. Supp. 983 (Sept. 27, 1966) wherein one of the defendants in Schackman v. Calif. (see footnote 45) brought a collateral civil action in the federal district court seeking a declaratory judgment that the films involved in the state criminal prosecution (D-15, O-7, O-12) were not obscene and asking for an injunction against enforcement of the California Statute. The aura of respectability given to such materials by the 1967 reversals and this Court's summary reversal of the criminal conviction in Lee Art Theatre v. Virginia, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S. Ct. 2103 (June 17, 1968),^{46/} was to change all this and, in opening Pandora's

46. The Lee Art Theatre case was decided on the last day of the 1967 October Term and without benefit of briefing on the merits or oral argument. The petition therein, Lee Art Theatre, Inc. v. Virginia, No. 977, October Term 1967, shows that the central issue was the seizure of the two films under the search warrant. The facts did not include the issue of a seizure incident to an arrest. The affidavit in support of the search warrant read, as follows (Petition for Certiorari, Appendix 2a, 3a):

"AFFIDAVIT FOR SEARCH WARRANT

"Commonwealth of Virginia,
City of Richmond, to-wit:

Box, set free a can of worms which has been plaguing law enforcement for four years.

Petitioner objects to the seizure of the

Before me,, a Justice of the Peace of the City aforesaid, this day appeared Charlie E. Phillips and made affidavit as follows:

- "(1) Substantially the offense in relation to which search is to be made. Possessing, exhibiting and showing lewd and obscene motion pictures, To-wit: 'The Erotic Touch of Hot Skin' and previews of 'Rent-A-Girl' motion picture.
- "(2) The material facts constituting probable cause for issuance of the warrant. Personal observation of the above mentioned motion picture and previews. Observation of the billboard in front of theatre.
- "(3) What is to be searched for under the warrant. Lewd and obscene motion pictures and other pornographic material that is kept in said theatre.
- "(4) The building to be searched. THE LEE ART THEATRE, 934 West Grace Street, Richmond, Virginia.

CHARLIE E. PHILLIPS
Affiant

"Subscribed and sworn to before me this 21st day of March 1966.

M. C. LOWRY, III
Justice of the Peace."

The very substantial difference between Lee Art Theatre and the case herein is apparent. See Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560, 566, 28 L.Ed.2d 306, 312, 91 S.Ct. 1031 (Mar. 29, 1971). Here there was no search - the seizure of the film whose presence was obvious to everyone being incident to the arrest, Nichols v. Ky., supra.

motion picture film "Cindy and Donna," viewing obscenity as a unique area, requiring special treatment. Such arguments are drawn out of context from language of certain members of this Court in Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961) and A Quantity of Books v. Kansas, 378 U.S. 205 (1964) and subsequent lower court decisions which, in misapplying such language, erroneously hold that a judicial determination of obscenity in an adversary proceedings is constitutionally required before a motion picture film may be seized as evidence for a criminal prosecution.

The Quantity of Books case concerned not a criminal prosecution, but an auxiliary means of attacking obscene materials - civil suppression of all copies through injunction, a form of relief given limited approval in Kingsley Book, Inc. v. Brown, 354 U.S. 436. Such injunction statutes are not always surrounded by the due process safeguards which automatically attend criminal prosecutions. Quantity of Books was, therefore, an example of a civil procedure presenting the problem (as four members of the court saw it) of unconstitutional prior restraint. In Quantity of Books, it was the civil process which was imperfect, and that decision sought only to bring the

civil procedure up to the level of the criminal process. It did not declare that the regular criminal procedures were outmoded.

The seizure of all copies as in Quantity of Books, pursuant to injunction may impinge directly on the First Amendment, whereas a seizure of a single copy, as evidence antecedent to a criminal prosecution, is cognizable under the Fourth Amendment. Civil remedies proceed directly against a publication, the sole issue being the nature of the publication; in the criminal proceedings, however, the issue is not suppression of books, but whether the defendant, by his conduct has committed a crime. Probable cause that he has committed a crime serves to bring him to trial, the seizure of publications becoming a gathering of evidence of the defendant's actions, and being purely incident to the arrest.

Misunderstandings placed upon the A Quantity of Books decision, stemming from a failure to distinguish its prior restraint civil aspects from criminal cases involving a seizure to obtain evidence for a criminal prosecution, have brought about a rash of bad law and chaos in this area of law.

Unfortunately, one of the first and best cases in this contentious area of the law went

unreported for 14 months. See East Village Other, Inc. v. Koota, finally reported in 305 F.Supp. 1159 (Feb. 13, 1968). In his opinion at page 1162, Judge Dooling correctly interpreted Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), and their relationship to the lower court obscenity decisions of Potwora v. Dillon (CA2), 386 F.2d 74 (Nov. 14, 1967), and Evergreen Review, Inc. v. Cahn (EDNY 1964), 230 F. Supp. 498, which were the leading federal cases on mass seizures at the time of Judge Dooling's decision.

The subsequent decisions were to lose themselves in the confusion flowing from the language in the Marcus and A Quantity of Books cases. The reasoning which led to the illogical results reached in Metzger v. Percy, 393 F.2d 202 (7th Cir. 1968), Cambist Films, Inc. v. Illinois, 292 F.Supp. 185 (No. Dist. Ill. 1968); Cambist Films, Inc. v. Tribell, 293 F. Supp. 407 (E. Dist. Ky. 1968); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969), and Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969) failed to take into account the limited previous restraint condition which had been

generally accepted in the federal custom cases and was finally upheld in U.S. v. 37 Photographs, 402 U.S. 363 (1971)^{47/}. See e.g., U.S. v. 56 Cartons of Magazines Entitled Hellenic Sun, 373 F.2d 635 (4th Cir. 1967); U.S. v. A Motion Picture Film Entitled "491", 367 F.2d 889 (2d Cir. 1966); U.S. v. One Book Entitled "The Adventures of Father Silas", 249 F.Supp. 911 (SDNY 1966); and U.S. v. A Motion Picture Film Entitled "Pattern of Evil", 304 F.Supp. 197, 199 (Sept. 2, 1969). Contra, U.S. v. 18 Packages of Magazines, 238 F.Supp. 846 (N.D.Cal. 1964). See also the discussion of these cases on this point in U.S. v. Brown, 274 F.Supp. 561, 565 (Oct. 18, 1967), where the Court said:

"Although the government does not urge

47. This Court should take judicial notice of the fact that these has never been a serious claim to a right to exhibit a film while the same was being timely pursued in the federal courts on an "obscene libel" charge. Compare U.S. v. Unicorn Enterprises, Inc., 403 U.S. 925, 29 L.Ed.2d 704, 91 S.Ct. 2241 (June 15, 1971) (Language of Love). If not in the federal jurisdiction, why should there be a different rule in state cases -- particularly here, where the "prompt judicial decision by the trial court" was reached 20 days after the arrest and seizure? Teitel Film Corp. v. Cusack, 390 U.S. 139, 142, 19 L.Ed.2d 966, 969, 88 S.Ct. 754 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690, n.2, 20 L.Ed.2d 225, 235, 88 S.Ct. 1298 (1968). Compare the procedure followed by Suffolk County District Attorney Byrne, commented on in the dissenting opinion of Justices Brennan, White and Marshall in Byrne v. Karalexis, 401 U.S. 216, 220, 27 L.Ed.2d 792, 796, 91 S.Ct. 777 (Feb. 23, 1971).

their application here, something should be said about the recent spate of cases involving the constitutionality of Section 305 of the Tariff Act of 1930, 46 Stat. 688, as amended, 19 USC Section 1305 (1964) which permits customs officials to hold and inspect allegedly obscene imports to determine whether forfeiture proceedings should be instituted." (Our emphasis.)

It was unfortunate that the first major decision in this area was a criminal prosecution which had some of the aspects of the mass seizure, civil process, prior restraint cases. In Metzger v. Percy, 393 F.2d 202, the Marion County Prosecutor on Oct. 25, 1967, made arrests at three outdoor movie theaters where the film, "I A Woman" was shown, and seized the prints being used by the three exhibitors. A fourth arrest was made by the Indianapolis police department on Nov. 2, 1967, in connection with its showing at an outdoor theater in that city, where that print also was seized. All four seizures were by police officers without arrest or search warrants, incident to an arrest for a misdemeanor committed in their presence. Six months later, when the Court of Appeals ruled on the matter, the criminal cases

had not yet come to trial.

In Metzger v. Percy, supra, the Circuit Court of Appeals for the Seventh Circuit, held that an adversary hearing was necessary before the motion picture film could be seized incident to an arrest for a misdemeanor committed in the officer's presence. The court ordered the film returned, but at the same time required that the exhibitor make it available to the County Prosecutor for the trial of the criminal prosecution - a somewhat inconsistent result. The Marion County Prosecutor announced that he was unable to prosecute the criminal case because of the break in the chain of evidence. It is submitted that the fundamental error of Metzger v. Percy appears at page 204, where the court stated:

"The lessons of Books is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment of the Constitution of the United States, and in a prior restraint condemned by the Supreme Court"

The court was thinking of the four prints which were seized in Metzger v. Percy and (very like-

ly) the delay in trying the criminal case, and equated the multiple seizure in that case to the multiple seizure in A Quantity of Books, without further analysis, i.e., inquiring whether the state procedures in such criminal cases, as here, authorized a speedy adversay hearing immediately after the seizure to permit the cognizable court to focus searchingly on the obscenity issue. Compare the California rule which authorizes just such a procedure in Holden v. Arnebergh, 71 Cal. Rptr. 401 (Aug. 21, 1968); appeal dismissed in Holden v. Arnebergh, 22 L.Ed.2d 112 (Mar. 3, 1969), and the speedy Kentucky procedure herein.

Thereafter, the Fourth Circuit Court of Appeals, relying on Metzger v. Percy and its faulty rationale, extended the Quantity of Books result as far as to say that a search warrant may not issue to seize a film as obscene, even when the issuing judge has himself taken the trouble to view the subject matter prior to his issuance of the search warrant. Tyrone, Inc. v. Wilkinson, supra. In the Second Circuit, Federal District Judge Pollack of the U. S. District Court for the Southern District of New York, however, held to the contrary on almost identical facts. 208 Cinema, Inc. v. Vergari, 298 F.Supp. 1175 at 1177 (May 5, 1969); Rage Books, Inc. v. Leary,

301 F. Supp. 546, 549 (July 1, 1969).

In Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662 (July 14, 1969) (E.D.La., New Orleans Div.) reversed on other grounds in Perez v. Ledesma, 401 U.S. 82 (Feb. 23, 1971), Justice Boyle in a 2-to-1 decision, with Justice Rubin dissenting, wrote an opinion that went the Pearcy decision one better - that court indicated an adversary hearing was necessary even as to material which had been purchased by the People. The court footnoted that statement with the remarkable observation:

"Of course, the defendants cannot be ordered to return the purchased materials, as in the instance of those seized, since title thereto had passed."

In his dissent, Justice Rubin voiced a more rational solution, at page 673:

"In considering ~~searches~~ incident to arrest, it must be remembered, Justice White said in his dissent in Chimel v. California, 1969, 395 U.S. 752, 782-783, 89 S.Ct. 2034, 2050-2051, 23 L.Ed.2d 685, 'that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been ap-

prised of the search . . . and having been arrested, he will soon be brought into contact with people who can explain his rights An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding.'

"That in my view is all that the state is required to do. It is no longer an acceptable proposition in tort law that a dog is entitled to one free bite, there should be no rule in criminal law -- even by virtue of the protection accorded to freedom of speech -- that every peddler of pornography is entitled to one free assay at scatology.

"Never has the Supreme Court intimated such a requirement. It gave no hint of it when, without exacting any adversary hearing prior to prosecution, it upheld the conviction of a defendant under a New York statute for a sale of

obscene materials to minors, in Ginsberg v. New York, 1968, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, or when it upheld another conviction under the New York statute for 'hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them.' Mishkin v. New York, 1966, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56. It is obviously impossible to hold a 'prior adversary hearing' with respect to the offense of hiring someone to prepare an obscene book and difficult to conceive that it would be practical to hold one for the offense of publishing them. Nor is the rule this Court now adopts consonant with the conviction affirmed in Ginzburg v. United States, 1966, 383 U.S. 462, 86 S.Ct. 942, 16 L.Ed. 2d 31, under an indictment charging violation of the federal obscenity statute."

See also, the excellent opinion of Federal District Court Judge Frankel, speaking for a three judge court in Milky Way Productions v. Leary, 305 F. Supp. 289, 295-297 (Oct. 15, 1967), af-

firmed on the merits in New York Feed Co. v. Leary, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct.817 (Feb. 27, 1970).

There is a plethora of conflicting decisions at the present time following one or more of the above authorities, some of which have resulted in open confrontation between state and federal courts of the order which resulted in the enactment of 28 U.S.C. Sections 2281 and 2284. See also footnotes 2 and 3 herein. One comes away from a study of these cases with the conclusion that the results obtained depend not on established principles of law but rather upon the personal philosophy of the members of the court writing the opinion. Nowhere is it more apparent than in the study in contrast of the opinions of the District Court of Appeal upholding a seizure of the film "Sexus" without a search warrant in Flack v. Anaheim Judicial District, 56 Cal. Rptr. 162 (Feb. 3, 1967), and the California Supreme Court overruling that decision in Flack v. Anaheim Municipal Court, 59 Cal. Rptr. (July 26, 1967). The former opinion recites the traditional role of the police officer in making arrests on probable cause, at page 165:

"It is settled law that an officer has the right and duty to arrest without a

warrant for a misdemeanor committed in his presence; and to seize property by means of which the crime was committed. (Citation.) Here, the theater where the arrest and seizure were made was open to public patronage. The arresting officers had the right to enter along with other members of the public. The film in question, which was shown on the screen to the patrons assembled, was deemed by the viewing officers to be contraband, whereupon they arrested appellant and seized the film as an incident to the arrest. No citation of authority seems necessary for the proposition that probable cause need not be previously determined in each instance by a judicial officer before a police officer can make the lawful arrest accompanied by seizure for that which would appear to 'the reasonable man' to be a crime involving contraband. Police officers cannot be relegated to a classification wherein their judgment would not meet the test enunciated in *Roth v. U.S.*,"

The California Supreme Court reversed, enunciat-

ing a new policy and different rule.^{48/}

Amicus submits that a state is not required to follow the California procedural rule and create exceptions to the traditional right of a police officer to seize evidence incident to an arrest. See Point IA4, supra, at page 49. If the state judiciary prefers to test the officer's judgment after arrest, by providing for an immediate adversary hearing procedure after arrest, there can be no serious claim of a constitutional infringement. If for no other reason than

48. For the past 10 years, the obscenity decisions of the California Supreme Court have been dominated by the liberal thinking of several of its justices. See, for example, Justice Tobriner speaking in Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152 (July 2, 1963) and In Re Giannini, 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (Nov. 14, 1968); Justice Mosk speaking in Barrows v. Municipal Court, 1 Cal. 3d 821, 83 Cal.Rptr. 819, 464 P.2d 483 (Jan. 30, 1970), and the dissenting opinions of Justices Tobriner, Peters and Mosk in People v. Luros, 4 Cal.3d 84 at 93, 92 Cal. Rptr. 833 at 839, 480 P.2d 633 (Feb. 18, 1971); Dixon et al. v. Municipal Court of City and County of San Francisco, 267 Cal. App.2d 875 73 Cal. Rptr. 587, 590 (Jan. 29, 1969), and Landau v. Fording, 245 Cal. App.2d 872, 54 Cal. Rptr. 177 (Oct. 24, 1966), the last of which was affirmed on the merits by this Court in Landau v. Fording, 288 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct.2d 109 (June 12, 1967). The Flack rule, decided in July of 1967, was a product of that liberal influence and a forerunner to the claim herein that there must be an adversary hearing before arrest and seizure. The absence of any discussion in Flack regarding the latter controversy is evidence of the recent origin and newness of such claims.

practicality and necessity, such procedures must prevail. See Holden v. Arnebergh, 71 Cal. Rptr. 401 (Aug. 21, 1968) where an attack was made on the Los Angeles City Attorney's law enforcement methods and California procedure which permits an officer to arrest and seize material incident to an arrest but requires an immediate adversary hearing after the arrest on the issue of probable cause, if the arrested party so desires. In his motion to dismiss the Holden appeal in the United States Supreme Court the City Attorney asked the following practical questions of this Court:

1. Will the task of reviewing each of the hundreds of items now reviewed by the prosecuting attorneys and their staff, be so burdensome to the courts, considering the crowded condition of their calendars, that they will be unable to act and to do so will in effect be an abdication of responsibility owed to the public at large to control the spread of pornography?

2. Can the courts afford to provide the time and the judicial personnel necessary to review the vast amount of trash publications that comprise much of the questionable material . . . ?

3. Will the court's preemption of the task now assigned by statutory law to prosecuting attorneys in deciding what is or is not obscene, add anything to true freedom of speech and press or will it result in more inability to agree as has been demonstrated by the decisions in *Redrup v. N.Y.* . . . ?

4. There is no constitutional requirement of judicial filtering of police judgment on probable obscenity prior to lawful arrest and seizure of allegedly obscene materials when the volume and quantity of such materials renders prior judicial scrutiny a barrier to public protection. . . ."

The City Attorney's motion to dismiss was granted. See Holden v. Arnebergh, 22 L.Ed.2d 112 (Mar. 3, 1969).

Conclusion.

In Roth-Alberts, this Court observed that it was the universal judgment of civilized nations that obscenity should be restrained. This presumption regarding the nature of the public evil amply supports the Kentucky Court of Appeals ruling which refused to except the obscenity crime

from the Legislature's grant of authority to a peace officer to make an arrest for a misdemeanor committed in his presence.

To prevail in a warrantless arrest three conditions must exist: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest. There can be no question as to the first two requirements having been met and the Petitioner, by conceding factual obscenity, is precluded from denying that probable cause existed.

The factual issue of "probable cause" in obscenity cases depends on several factors, primarily: (1) The nature of the film and (2) the capacity of peace officers to evaluate obscenity in light of the Roth standards. Petitioner, having conceded the former, that issue is not before this Court. As to the latter matter, the Kentucky Court of Appeals has ruled that in Kentucky a peace officer has such capacity where the crime is committed in his presence. That is a reasonable rule as the majority of states have concluded, which have ruled on the issue.

The State of Kentucky, under this Court's decision in Ker v. California, supra, has the legal right to select a rule which requires that the administrative determination of "prob-

able cause" on obscenity made by the police officer be examined judicially immediately after the arrest. The ever increasing judicial work load prevents this Court from fashioning a rule which would establish state and federal courts as the only forum for examining films, magazines, etc. in executing the administrative function of determining whether or not such subject matter is a proper subject for an obscenity charge. Further, such an arrogation of power would place a court in the position of a law enforcement officer or agency and would controvert rudimentary rules and principles which have been established to maintain a careful balance in the separation of powers. Were this Court to create such a rule, it would invite additional litigation and further appeals to this Court involving refinements to the new rule.

Society has a legitimate interest in suppressing crime and detecting criminals. That interest requires, (1) that the instrumentality of crime be preserved as evidence against alteration or destruction; (2) that autoptical evidence be preferred to testimonial evidence, and (3) that the reputation of the general authority of peace officers be maintained as a deterrent to crime.

It is generally recognized that the positive film print used to project images and sound can be easily altered to remove suspicious scenes. The pursuit of truth requires that the integrity of such evidence, as the instrumentality of the crime, be preserved for the trial of the matter where it may serve society as a means of freeing the innocent or convicting the guilty. The erection of another barrier for police to hurdle in their already difficult responsibility for curbing obscenity, would hinder rather than advance the natural development of such "police science."

It is unrealistic to claim that the right to seize a film as evidence can have a greater "chilling effect" on free speech than the right to arrest the person who is causing such projection. Since this Court has already confirmed that the latter right exists, it must also follow that the former right also exists. It would be an anomalous result for this Court to hold that an individual's personal liberty could be immediately arrested, but the inanimate instrumentality of the alleged crime could not.

There is nothing inherently wrong with a prior restraint resulting from a state criminal prosecution which is timely pursued. Here, the

21 days which elapsed between the arrest and seizure and the final determination by the trial court are well within permissible constitutional limitations.

This Court should pay particular attention to the special verdict of KRS Sect. 436.101(8) which offers a legislative solution to the impasse reached by this Court on the scienter issue in the Redrup case.

Amicus submits that, for all of the foregoing reasons, the judgment of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted.

CHARLES H. KEATING, JR.,

Amicus Curiae.

A P P E N D I X "A"

Pages 1-8

MEMORANDUM OPINION OF LOS ANGELES
COUNTY SUPERIOR COURT JUDGE L.
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LTD., A CALIF. CORPORATION, ET AL.,
v. SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE COUNTY OF LOS
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NO. B. 168491, DELIVERED FROM THE
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AUGUST 8, 1972, REPORTING ON JUDGE
HANSON'S REMARKS FROM THE BENCH.

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LOS ANGELES TIMES ARTICLE OF AUG.
10, 1972, REPORTING ON REDELIVERY
OF MATERIAL.

MEMORANDUM OPINION OF
LOS ANGELES COUNTY SUPERIOR COURT
JUDGE L. THAXTON HANSON

Judicial review is a very proper and highly necessary part of our system of justice. This Court acknowledges the proper chain of duly constituted judicial authority. Therefore, it is the duty of this Court to comply with the writ issuing from the Second Appellate District. However, the fact that an Appellate Court issues an order does not necessarily make it right. Nor by complying with the writ does it mean that this Court agrees with or concurs in the decisions, actions or manner of handling by the State reviewing Courts. To the contrary, let the record reflect that it is the opinion of this Court that such decisions and actions have no basis in fact or law, logic, reason, and just plain common sense.

This matter, representing weeks of a Trial Court's time and the expenditure of thousands of dollars of taxpayers' money, presented important issues which have been disturbing and perplexing our Courts, the Bar and the public for some time; namely a delineation of the lines of judicial authority, vis-a-vis State and Federal Courts; and the resolution of "obscenity law" problems. In my opinion, the State reviewing Courts have fumbled

the ball. Both of these issues have been side-stepped and left unresolved by our reviewing courts, when the courts very existence is created, financed and maintained by the people for the prime purpose of decision making. Only by so acting can we expect to earn and retain the respect and confidence in our system of justice, which is so rapidly waning.

As to the lines of judicial authority, vis-a-vis State and Federal Courts, I have recently returned from the Graduate Course of the National College of State Judiciary, and while in seminar sessions with State Trial Judges from many States in this Nation, I was amazed to hear from my colleagues that the problem of Federal Court intrusion into State judicial processes is not limited to California, but this practice is a growing nation-wide problem plaguing the State judicial systems of many States. It is as if the Federal Courts have installed revolving doors with slippery floors, and counsel scurry in and out, obtaining injunctions and orders from Federal Courts which throw a monkey wrench into State judicial procedures. This is interpreted by many State judges as a blatant Federal Court power grab which is clearly unconstitutional and which seriously hampers the efficient judicial processes

of the States. A railroad cannot possibly be run with someone continuously throwing a switch and side-tracking the main express. A fortiori -- how can a responsive and efficient State criminal justice system function with unwarranted Federal Court interference? The long-accepted doctrine of exhausting State remedies and the more recent "doctrine of abstention" must be adhered to.

This issue has not been decided in this case because, although the Federal Panel finally deferred to the State Courts, the Appellate Court "bellied up" by summarily ordering the Trial Court to conform to the Federal Order. Thus an opinion on this vital issue in this case has been short circuited by the Appellate Court, is apparently now moot, and a final determination by the United States Supreme Court will not be forthcoming.

As to the "obscenity law" issues, this matter came on in the ordinary course of the Court's official business. It has been and continues to be a "case," not a "cause." However, this Court has received literally hundreds of communications, written and verbal, from concerned citizens, professional people, lawyers, and judges - State and Federal - from California and from the far corners of the Nation, all supporting this Court's handling of this matter and expressing concern over

the flood of pornography. It has thus become apparent to this Court that the public, many trial courts and many attorneys are confused, upset and becoming very disillusioned over the delay by reviewing courts in resolving this problem. They desire a resolution of the problem, which is long overdue.

The reasons why this whole pornography problem should be faced resolutely and rapidly decided by the courts is reflected in the banner headlines of the Los Angeles Daily Journal:

Dateline June 2, 1972, "The Pornography Boom - A Growth 'Industry' in the Golden State";

June 5, 1972, "State Pornography Boom - Enter the Men from Organized Crime";

June 7, 1972, "Boom in Pornography - Many Arrests, but very few Convictions."

Further, evidence of widespread and deep-rooted disenchantment and concern in this area may well be found in the fact that State Senator John Harmer in only 17 days obtained 410,000 valid signatures to qualify an anti-pornography initiative which will appear on the November ballot.

The courts should ask themselves: Why must the people have to take this action? The present California Penal Code makes it a crime to sell and distribute obscene materials. Why are the

"obscenity laws" on the books not being enforced? Why are some 13,500 reels of hard-core pornography, found to be obscene after a full hearing and declared contraband, being ordered returned? Why? What is going on here?

The Federal Panel, without viewing the films or taking evidence, made a finding that "irreparable harm will result" if the seized "obscene" film is not returned to the owners. Division Four, Second Appellate District, in its unsigned findings of May 31, 1972, without viewing the film or hearing argument, unsupported by fact or law, held "the need for relief is urgent," i.e., to have the "obscene" materials returned to the owner. The basis for or the logic of these findings escapes this Court. The California Penal Code provides it is a crime to sell or distribute "obscene" materials. Where is the "irreparable harm?" Why the "urgent" need for relief? The criminal case, including a felony count for conspiracy, is still pending in the courts, and there is a provision in the California Penal Code for disposition of the materials by the Trial Court, if convicted.

This Court does not wish its comments to be misinterpreted. In my opinion, California has the finest judicial system in the Nation. Like many

other institutions which are experiencing problems -- the colleges, the churches, etc. -- the judiciary has not escaped its problems. This Court continues to have faith that the perplexing problems of the day will be resolved in a calm and reasonable manner within our judicial system. The sooner the better!

Nor does this Court intend its remarks to be interpreted as a broadside indictment of all Federal Judges or State Appellate Justices. The vast majority of them are solid, sound, hardworking jurists. Nor does it intend to impugn the integrity or sincerity of the Federal Judges or Appellate Justices who have passed on this matter. This Court respects their sincerity and their right to their opinions. However, this Court is entitled to its findings and opinions, based on its full and complete hearing. There is simply a complete divergence of opinion.

POOR COPY

Judge Reluctantly Obeys Order to Return Sex Films

L.A. Valley News
August 8, 1972.

By PAUL WERTZ

The curtain dropped yesterday on a seven-month-old Van Nuys sex film case, but not before a Superior Court judge made it clear he is in disagreement with a state appellate court.

Judge L. Thaxton Hanson vacated his previous order that the county clerk's office hold more than 13,000 reels of sex movie film and bowed to an order by California's Second District Court of Appeal permitting the return of the films to the makers.

Before issuing the new order, however, Judge Hanson had some stern words about the case.

"In my opinion, the state reviewing courts have fumbled the ball," the judge said.

Judge Hanson said the state appellate court "belatedly" by ordering Hanson's court to comply with an earlier federal court order that all but three copies of each reel go back to the corporations which made and manufacture the movies.

Yesterday's decision was made under a Second District Court preemptory writ of mandate obtained by attorney Stanley Fleischman, who represents the film makers — Cinema Classics, Cal-Mail Inc., Seca Inc., Movie-matic Inc. and Pendulum Publications.

Dep. County Counsel Michael Dougherty and

Continued on Page Ten

Continued from Page One
Dep. City Atty. Dave Schacter, both present yesterday in Van Nuys, said the California Supreme Court refused July 26 to grant a hearing on the Second District Court's opinion earlier this year that the county clerk's office may not hold all of the films.

The Second District Court's opinion was handed down after the case had bounced between federal and state courts on the issue of whether such a large volume of reels could be held pending court action.

Police armed with search warrants seized nearly 14,000 reels of movie film last December and January in separate raids in Los Angeles and the Hollywood area.

Investigators learned that the black and white and color films — carrying a street value of about \$300,000 — were being sold via the mail for prices ranging from \$40 per copy up to \$1500 for one film.

The \$1500 movie was a 16 mm color-sound film showing various sex acts.

Samples of the films were reviewed in open court by Judge Hanson, who watched three to four screens simultaneously in an effort to afford a judicial review of the material to determine if they were obscene.

The Van Nuys jurist conducted two weeks of review and actually screened about 350 sample films before declaring about 98% of the movies to fall within the State Penal Code definition of obscenity.

Meanwhile, however, Fleischman and associate attorneys obtained a federal court order mandating the release of the films. The order was issued before Judge Hanson

When Hanson learned of the order, he completed the hearing, ruled the films to be obscene and later ordered the more than 13,000 reels seized and held by the county clerk's office as evidence.

Ruled Obscene

In reality, the films were not evidence in a pending criminal case until after the obscenity hearing, when three men were charged with conspiracy to distribute obscene material.

With Judge Hanson's order on the books and the films locked in the county clerk's vault, the attorneys for the film makers returned to the federal court and eventually went to the state Second District Court of Appeal to get their films back.

Dougherty and Schacter said yesterday the massive volume of movie reels, now stacked on pallets in the Old Hall of Records, probably will be turned back to the film makers tomorrow morning.

Before they left Judge Hanson's courtroom yesterday, both attorneys also had comment on the lengthy, lost battle.

Dougherty said the fact Judge Hanson was forced to vacate his order holding the obscene films is a "stupid result" of the legal fight.

Schacter maintained that the "people of the state of California have been denied due process of law."

"We have been denied our day in court," Schacter complained, referring to the several attempts to get a full hearing before the appellate courts.

Called "Depraved"

Judge Hanson said his court was the only one which "had to go through the indignity of reviewing this depraved material" and the local jurist expressed general disagreement with what he has termed the "interference" of upper courts in a state court matter.

The original federal District Court order came from a three-judge panel made up of Judges Walter Ely, of the U.S. Court of Appeals, and District Court Judges Jesse W. Curtis and Irving Hill.

The state appeal court's decision and order of last week came from Division Four of the state Second District Court of Appeal.

Because the original order of last June was unsigned, it is not clear if one or more of the state appeal court division's justices ruled on the case.

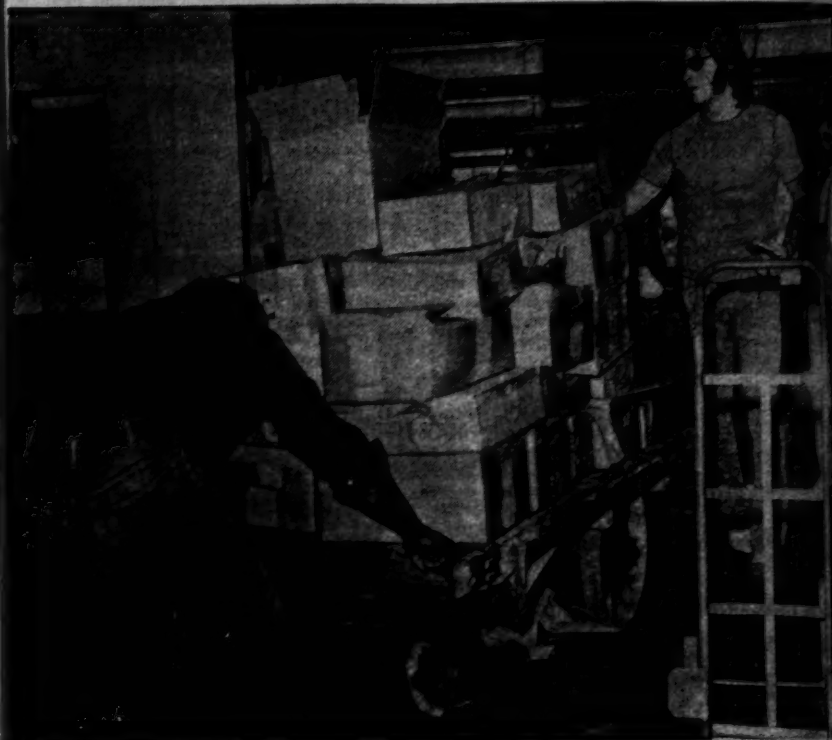
The justices in Division Four, located in Los Angeles, are Gordon L. Files, presiding justice; Robert Kingsley, Edwin C. Jefferson and Gerald C. Dunn.

Judge Hanson sought yesterday to make it clear that his compliance with the upper court's order did not mean he agrees with the mandate.

Issue Unresolved

"To the contrary, let the record reflect that it is the opinion of this court that such decisions and actions have no basis in fact or law, logic, reason and just plain common sense," Judge Hanson said.

Judge Hanson charged that the issues of separation of federal and state court responsibilities and obscenity laws have been "side-stepped" by the reviewing courts "when the courts' very existence is created, financed and maintained by the people for the prime purpose of justice."



ROLLING BACK THE FILM—Cartons containing 8,000 reels of sex films are wheeled from the jail of Records building after being ordered by judge to be returned to the owners. The films

had been seized with the arrest of three distributors, whose obscenity trial is still pending. A three-judge federal panel ordered return of films, meanwhile, on the basis that seizure was illegal.

Times photo by Larry Mar

in the
Supreme Court
of the
United States

OCTOBER TERM, 1971

No. 71-1134

HARRY ROADEN,

Petitioner,

vs.

STATE OF KENTUCKY,

Respondent.

On Writ of Certiorari to
The Supreme Court of Kentucky

Joel Hirschhorn, Esq., Ralph J. Schwarz, Jr., Esq., and
Mel S. Friedman, Esq., on behalf of The First
Amendment Lawyers' Association, as Amici
Curiae in Support of Petitioner.

RALPH J. SCHWARZ, JR., ESQ.
22 East 40th Street
New York City, New York
(212) 686-8160

MEL S. FRIEDMAN, ESQ.
723 Main Street, Suite 410
Houston, Texas
(713) 228-6481

JOEL HIRSCHHORN, ESQ.
25 West Flagler Street
Suite 1040
Miami, Florida
(305) 358-3330

OCT 7 1972

Denied 10
MICHAEL DOBBS, JR., CLERK

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OCTOBER TERM, 1971

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**Joel Hirschhorn, Esq., Ralph J. Schwarz, Jr., Esq., and
Mel S. Friedman, Esq., on behalf of The First
Amendment Lawyers' Association, as Amici
Curiae in Support of Petitioner.**

Joel Hirschhorn is a member of the bar of the State of Florida and of the United States Supreme Court. He has been involved in litigation in both Federal and State courts involving the issues presented by this Amici Curiae Brief.

In accordance with the rules of this Court, consent to the filing of a Brief Amici Curiae has been obtained from the attorney for the Petitioner HARRY ROADEN, and is being filed simultaneously with the Brief herein with the Clerk of this Court, but permission to file a Brief Amici Curiae was denied by the State of Kentucky, Respondent herein.

Mr. Hirschhorn has associated with him on this Brief Ralph J. Schwarz, a member of the bar of this Court and of the State of New York. Mr. Schwarz is presently involved in litigation in both Federal and State Courts involving the same issues presented here.

Also associated on this Brief is Mel S. Friedman, a member of the bar of the State of Texas and of the United States Supreme Court. Mr. Friedman has also been involved in litigation in both Federal and State Courts involving the same issues presented here.

Messrs. Hirschhorn, Schwarz, and Friedman have prepared and presented this Brief on behalf of the First Amendment Lawyers' Association which consists of approximately seventy-five (75) attorneys practicing law throughout all State and Federal courts in the United States and who deal primarily with First Amendment and related issues.

Amici have attempted to limit the issue presented to a narrow issue dealing with a right of adults to receive materials under the First Amendment. A brief historical review of the development of the First Amendment is presented in order that the Court can properly view the complex question of the protection of the First Amendment in light of the historical development of this right. Considerable reference is made to The Report of the Commission on Obscenity and Pornography prepared pursuant to Public Law 90-100 and published by the United States Government Printing Office, Washington, D.C.

ARGUMENT

WHETHER, UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, AN ADULT, PREVIOUSLY FOREWARNED, HAS THE ABSOLUTE RIGHT TO BUY, SELL, RECEIVE, WRITE, PUBLISH, DISTRIBUTE, DISSEMINATE AND/OR EXHIBIT HARD CORE PORNOGRAPHY AND OBSCENE MATERIAL TO OTHER PREVIOUSLY FOREWARNED ADULTS PROVIDING THERE IS NO ASSAULT OR INTRUSION UPON THE SENSIBILITIES OF OTHER NON-INTERESTED ADULTS, NO PANDERING, NOR JUVENILE INVOLVEMENT?

A. HISTORICALLY THE FIRST AMENDMENT PROTECTS PORNOGRAPHY AND OBSCENITY.

The Amici contend that historically the First Amendment to the United States Constitution was never intended to deny protection to pornography and obscenity. In short the **Roth-Alberts** conclusion that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. 476, 485 (1957), is historically incorrect. Like Mr. Justice Douglas, see **Memoirs v. Massachusetts**, 383 U.S. 413 (1966), 428-433 (concurring opinion, Mr. Justice Douglas), Amici contend that "obscenity" was not an established exception to the First Amendment guarantee of Free Speech and Press when the Bill of Rights was adopted in 1791.

During the fight for ratification of the United States Constitution it became apparent that many prominent colonialists were deeply troubled by the apparent sweeping powers of the new Federal Government. These concerns were met when, led by James Madison, twelve proposed amendments were approved by Congress in September, 1789. Ten of these were ratified by the individual States and on December 15, 1791, the "Bill of Rights" became part of the United States Constitution. It is significant to note that at the time of the enactment of these amendments:

1. Only one colony, Massachusetts, had a statute prohibiting "intemperance, immorality and profaneness", which was enacted in 1711; the first State statute prohibiting commercial distribution of obscenity was enacted in Vermont in 1821; the first Federal statute, was enacted in 1842.

2. Lumped together with religion, Freedom of Speech was clearly intended to be as absolute as the right of one to choose his own form of religious worship.

3. The mandatory language of the First Amendment, like that of the other nine amendments, make it clear that absent overwhelming justification, the Freedoms of Religion, Speech, Assembly and Petition are absolute.

4. Only specific, narrow exceptions to these limitations on the powers of the new Federal Government would be permitted, such as criminal libel, and the Alien and Sedition Acts. The reports of the First Congressional debates regarding these proposed amendments are ap-

parently incomplete but inference is clear that the Bill of Rights was intended to curb and not extend Federal (i.e. Governmental) Powers, see Kronvitz, *Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly*, pp. 345-361 (1957).

5. The First Amendment guarantee of Freedom of Speech and Press was designed to insure absolute freedom from governmental control of the newspaper and publishing industry in general, and was not intended as a proscription against obscenity or pornography because the publication of such material was not a secular crime at Common Law in 1791, see Point C, *infra*.

Thus it is clear that the *Roth-Alberts*, *supra*, conclusion of obscenity is not protected is incorrect, and ought to be reversed.

B. OBSCENTY PER SE FALLS WITHIN THE PROTECTION OF THE FIRST AMENDMENT.

As stated, *Roth v. U.S.*, *supra*, held that obscenity was outside the protection of the First Amendment based on premises stated in that decision which Amici submit on reconsideration are not constitutionally valid for either the several States or the Federal Government. Indeed, it is submitted there is no valid justification for the automatic exclusion from First Amendment protection of a form of expression called obscenity. In fact, and law, there are compelling reasons consistent with the First Amendment why it should not be excluded. Moreover, where the exercise of First Amendment rights is claimed to be abridged, it is the function of this Court to weigh the

circumstances and appraise the substantiality of the reasons advanced in support of such laws and regulations, *Thornhill v. Alabama*, 310 U.S. 88, 95, 96 (1940). By obscenity *Amici* refer, of course, to the material itself or the obscenity *per se* on the assumption that the mode of commercial distribution is such that only a willing, consenting adult, who has been previously forewarned of the contents is the purchaser or viewer. While the justifications advanced for the automatic exclusion of obscenity tend to overlap they break themselves generally into three categories.

The first justification for claiming that obscenity is outside the pale of the First Amendment stems from the fact that laws regulating profanity, blasphemy and criminal libel had been deemed, especially in the early stages of the formation of the Union, to be outside the protection of the First Amendment. The essential rationale underlying the justification for excluding such utterances from First Amendment protection, as set forth in *Beauharnais v. Illinois*, 343 U.S. 250, 256, 257 (1952), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942), is that "fighting words" which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. By dicta, habit and automation stemming, undoubtedly, from a lack of any real need to focus on the issue, obscenity was always linked with the profane and libelous utterance. However, the rationale for the automatic exclusion of the profane and criminally libelous utterance has been seriously undermined and essentially overruled recently in *Ashton v. Kentucky*, 384 U.S. 195 (1966), *Cohen v. California*, 403 U.S. 15 (1971), *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Hence, the justification for the automatic exclusion of obscenity must

fall. Moreover, assuming any justification for the automatic exclusion of criminal libel, a libel does inflict injury because it is false and is not any step in the search for truth because the libel by its very nature is false. A picture of a man and woman engaged in coitus when viewed by one who wants to view it does not inflict any injury on the viewer and is not *per se* false.

The second justification for the automatic exclusion of the obscene is the erroneous assumption that the First Amendment protects only the expression of ideas, connoting an intellectual communication. The First Amendment however, protects every expression and communication be it for purposes of entertainment, amusement, or fulfillment of a person's intellectual or emotional needs, and regardless of its worth, and is not limited just to the expression of an idea, *Winters v. New York*, 333 U.S. 507, 510 (1948), *Hannegan v. Esquire*, 327 U.S. 146 (1946), see also 72 Y.L.J. 877, 879 (1962).

The third apparent justification is that the viewing of obscenity leads to anti-social conduct and illegal behavior, and has an adverse impact on personality, and an adverse moral impact. There is virtually no scientifically accepted empirical data that obscenity or pornography lead to any crimes of sexual violence or other anti-social behavior as this Court has already recognized, *Stanley v. Georgia*, 394 U.S. 557, at 566 nt 9 (1969). Indeed, the data collected shows no causal relationship between "obscenity" and any criminal conduct, see generally Report of President's Commission on Obscenity and Pornography and Point D, *infra*.

The argument that obscenity has an adverse moral impact serves to emphasize the fact that obscenity does indeed convey ideas (although presumably bad), otherwise there would be no objection to it.

1. THE PROFANE AND LIBELOUS FIGHTING WORDS EXCEPTION.

As stated above the automatic exclusion of obscenity as being outside the penumbra of the First Amendment sought to be justified is by analogy to the exclusion of the profane and the libelous. Recently, however, the premise underlying *Chaplinsky*, *supra*, has been denounced and there is now no justification for the exclusion of the so-called "obscene".

In *Cohen v. California*, *supra*, the defendant was convicted of violating a section of a California Penal Code which prohibited maliciously and willfully disturbing the peace and quiet of any neighborhood or person by offensive conduct. The defendant's conduct consisted of wearing a jacket in a Los Angeles, California, Courthouse which bore the words "Fuck the Draft". In common parlance, these words would certainly be considered profane and vulgar and as the Court observed, 403 U.S. 20, words "not uncommonly employed in a personally provocative fashion". Despite the fact that these words are generally regarded as profane, vulgar and used as an insult, the Court held the conviction could not stand on the grounds that while the use of the words was inherently likely to cause violent reaction, it was not shown that the words were directed at any one, and that the phrase in question

demonstrated defendant's feelings. The case also demonstrates a clear reversal of the **Chaplinsky** principle.

In **Ashton v. Kentucky**, 384 U.S. 195 (1966), the petitioner was convicted for committing the common law crime of criminal libel. This Court held the statute in question unconstitutional and reversed the defendant's conviction. In doing so, this Court relied in great part on cases involving breach of the peace offenses and especially **Cantwell v. Connecticut**, 310 U.S. 296 (1940), Cantwell was convicted for breach of the peace for playing a phonograph record, in a public place, which attacked religion and the Catholic church in general. When a listener objected Cantwell left. In **Cantwell**, *supra* at 309, this Court pointed out that provocative language amounting to a breach of the peace has almost always consisted of "profane, indecent or abusive remarks directed to the person of the hearer". In short then, this Court has recognized in the case of the profanity and the criminal libel that it is not just a matter of the public utterance of the words *per se* but rather whether the words are directed at a particular hearer under circumstances where he cannot avoid them.

The profane and the criminal libel are not therefore just automatically excluded from First Amendment protection. The States do not have the power to regulate such utterances or the basis that they are automatically outside the protection of the First Amendment. The presumption then that the so-called obscene is automatically excluded from First Amendment protection must likewise fall, for the justification for the automatic exclusion of obscenity has stemmed from the automatic exclusion of utterances which are *ipso facto* profane or libelous.

Moreover, it is hard to understand the rationale for the conclusion that the obscene and profane is outside the First Amendment except that historically they had been erroneously linked and that the "obscene" was bad and, therefore, deemed an insult. In addition, there is even less basis for the automatic exclusion of the "obscene" where purchased or viewed by a consenting forewarned adult. There is absolutely no basis to conclude that such utterances could inflict injury on such a consenting adult.

Amici's position is strengthened by two recent decisions of this Honorable Court, *Gooding v. Wilson*, 405 U.S. 518 (1972), and *Rosenfeld v. New Jersey*, ____ U.S. ____, 33 L.Ed.2d 321 (1972). In *Rosenfeld*, supra, this Court vacated and remanded appellant's conviction under a New Jersey statute prohibiting the use of profane or indecent language in a public place in light of *Gooding*, supra, and *Cohen*, supra. In *Rosenfeld*, supra, appellant had used the phrase "Mother Fucker" on four separate occasions to describe the teachers, school board, the town, and the United States of America, at a public school board meeting attended by about 150 people, 25 of whom were minors, and 40 of whom were women (and thus presumably sensitive to such language). Even dissenting Justice Powell recognized, however,

But our free society must be flexible enough to tolerate even such a debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case, 33 L.Ed.2d at 324.

2. THE FIRST AMENDMENT PROTECTION IS NOT LIMITED TO THE EXPRESSION OF IDEAS AND FURTHER OBSCENITY CONVEYS IDEAS.

This Court has recognized that the First Amendment is not limited to the exposition of only popular ideas but covers expressive matter commercially distributed even though it is entertaining or vulgar, *Winters v. New York*, supra, 335 U.S. 507, 510 (1948), *Hannegan v. Esquire*, 327 U.S. 146, supra. In *Cohen v. California*, supra, 403 U.S. at 26 this Court recognized that an expression conveys "not only ideas but otherwise inexpressible emotions as well".

While the search for the truth through ideas is one very critical basis for the First Amendment, it is not the only basis. Clearly, the First Amendment protects non verbal expression, see 72 Yale L.J. 877, 879, (1962).

The justification for excluding obscenity on the assumption that the First Amendment protects only the written or verbal expression of an idea is therefore not accurate. Furthermore, this question of whether even obscene expressive utterances (or publications) are to be excluded on the grounds that such material conveys no ideas itself refutes one of the justifications for excluding obscenity. 79 Yale Law Journal 209, 211, 212, (1969-70).

One of the basis for excluding obscenity is allegedly that it has a harmful moral impact and leads to the disintegration of the moral fibre. Assuming this to be a justification (though it is not) obscenity could not have such an impact unless it did indeed present ideas and

stimulate argument and debate. 79 Yale Law Journal 211, 212, 216, (1969-70).

We live in a highly mobil, fragmented society with woman's equality a foregone conclusion, if not yet a reality. The role of sex in society is a critical one. The presentation of the so-called obscene forces people to reevaluate their own attitudes on this subject. In fact, even the so-called obscene aids in the never ending search for the truth. The so-called obscenity reflects in major part a change in attitudes about sex and is one factor which helps people to evaluate and reevaluate their ideas and attitudes about the roles of men and women and sex attitudes in our ever changing society. The notion that obscenity does not convey an idea is simply not true, 79 Yale L. J. at 215, 216. If pornography did not convey ideas there would be no murmur (much less the hue and cry), about its presentation to consenting adults.

3. THERE IS NO CASUAL RELATIONSHIP BETWEEN PORNOGRAPHY AND HARMFUL CONDUCT.

As stated, this Court has already recognized that there is little, if any empirical evidence that obscenity induces crimes of sexual violence, *Stanley v. Georgia*, *supra*. There is no scientific basis for a presumption that it induces violent conduct or crimes of any kind and governmental studies have shown the contrary, see the Report of the Commission on Obscenity and Pornography, *supra*.

Thus, this Court has stated:

Criminal statutory presumptions must be regarded as irrational or arbitrary and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 1548 (1969).

Of course, the most widely recognized exception to the First Amendment is where the exercise of the Freedom of Speech and/or Press results in or creates a "clear and present danger" to society or some segment thereof, *Schenck v. United States*, — U.S. —, 39 S.Ct. 247 (1919). That is, will the exercises of the First Amendment in the manner under review, "bring about the substantive evils that Congress has a right to Prevent"? As asserted in *Schenck*, supra, this question is one of "proximity and degree".

In light of the conclusions of the extensive studies, (i.e. the Report of the Commission on Obscenity and Pornography), done at Presidential request and governmental expense, how can it be argued that obscenity and pornography is not entitled to the protection of the First Amendment? Assuming the conclusions of the Report to be true, even hard core pornography has no harmful impact on the recipient and thus creates no "clear and present danger". It follows therefore that there is no constitutional justification for the continued governmental repression and suppression of sexually oriented material.

This conclusion is even further strengthened by this Court's holding that:

The Government "thus carries a heavy burden of showing justification for the imposition of such a [i.e. prior] restraint". **New York Times Company v. U. S.** [Pentagon Papers Case] — U.S. ___, 91 S.Ct. 2140 (1971).

Neither the States nor the Federal Governments can sustain justifying prohibiting forewarned consenting adults from buying, selling, receiving, writing, publishing, distributing, disseminating or exhibiting obscene materials to other consenting forewarned adults.

C. WHETHER FOREWARNED CONSENTING ADULTS HAVE THE ABSOLUTE RIGHT TO ENJOY FOR THEIR OWN PRIVATE PERSONAL ENTERTAINMENT AND/OR DESIRE HARD CORE PORNOGRAPHY AND OBSCENITY.

The rights guaranteed by the Constitution or otherwise are not absolute rights in the sense that they entitle a citizen to act in any way he pleases. Rather he must exercise his rights in such a way that the rights of others are not denied. . . . Honorable Sam J. Ervin, Jr. (D., N.C.) "Layman's Guide to Individual Rights Under the United States Constitution," 3rd Ed. (Government Printing Office, Washington, D. C., 1972).

Assuming, arguendo, Senator Ervin's remarks that constitutional rights are not absolute, to be true, it is clear that so long as one's private acts do not disparage the rights of others, this right (of privacy) is absolute. And, if this Court accepts the conclusions of the Report of the Commission on Obscenity and Pornography, *infra*, then a forewarned consenting adult has the absolute right to receive for his (or her) own private enjoyment or entertainment, or use, even hard core sexually oriented material of the most depraved and foul nature imaginable, *Stanley v. Georgia*, 394 U.S. 557 (1969). Of course, this absolute right to receive under the protective penumbra of the First and Ninth Amendments, *Griswold v. Connecticut*, 381 U.S. 479 (1965), is meaningless unless some other adult (individual or corporate) has the absolute right to offer for sale or exhibition the materials necessary to meet this right receive, *U. S. v. Langford*, 315 F.Supp. 193, (Minn. 1970), and *U. S. v. Lethe*, 312 F.Supp. 421 (Cal. 1970).

Amici's position stated simply is that:

1. The right to buy, receive, write, publish, distribute, disseminate, sell, or exhibit hard core pornographic and obscene material was protected, at Common Law, from secular courts.
2. The Ninth Amendment to the Constitution protects and preserves for the people all rights they enjoyed prior to the enactment of the United States Constitution.
3. Present case law protects and preserves private sexual acts of consenting adults.

4. Both the Fourteenth Amendment equal protection of the laws clause and *Stanley v. Georgia*, supra, protects the right to receive and the collateral right to sell or exhibit hard core pornography and obscene materials provided of course there is no pandering, juvenile involvement, nor intrusion upon the sensibilities of unwilling adults. Amici will treat each of these four arguments separately.

1. THE COMMERCIAL PUBLICATION, DISTRIBUTION, SALE AND/OR EXHIBITION OF OBSCENE MATERIAL WAS NOT A CRIME, AT COMMON LAW, PUNISHABLE BY SECULAR COURTS.

The crime of publishing, distributing, selling, and/or exhibiting obscene material is of recent vintage. Some eighty-three (83) years prior to the enactment of the First Amendment, the Star Chamber held in a per curiam opinion, that:

A crime that shakes religion (a), as profaneness on the stage, & c. is indictable (b); but writing an obscene book, as that entitled "The Fifteen Plagues of a Maidenhead," FPM, is not indictable but punishable only in the Spiritual Court (c). *Queen v. Read*, Case No. 205, Michaelmas Term, 6 Queen Anne, S.C., 2 Stra. 789, 11 Mod. Rep. 142 (1708).

Subsequent British Decisions punished, initially, "obscene libel", *King v. Curl*, 2 Stra. 788 (1727); but it was not until 1824 that a statute was enacted in England permitting secular prosecution for a public exposure of ob-

scene material, 5 Stat. Geo. 4, C. 83. Thus, at the time of the enactment of the Ninth Amendment, obscenity, (i.e., eroticism sans blasphemy), was not a crime in England.

Moreover, only one colony, Massachusetts, had a statute prohibiting commercial obscenity prior to 1791, (this statute was entitled "an act against intemperance, immorality, and profaneness, and in reformation of manners"). The other colonies left the question of obscenity to the Spiritual Courts. The first state to enact a statute prohibiting commercial distribution of obscenity was Vermont in 1821, Laws of Vermont, 1824, Ch. XXIII, No. 1, Section 23. And, it was not until twenty-one (21) years thereafter that Congress enacted its first law prohibiting the introduction of obscene material into the United States, 5 U.S. Stat. 566 (1842).

The Report of the Commission on Obscenity and Pornography, at page 297-298, traces the history of the merger of religious profaneness, blasphemy and obscenity. The conclusion is inescapable that when Read, supra, was acquitted in 1708 for writing the sexually obscene book, "The Fifteen Plagues of a Maidenhead", because the book libeled no one, did not attack the Government of England, and was not blasphemous, the matter was one best left to the "Spiritual Court".

The Ninth Amendment of course provides that:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

In essence, the Ninth Amendment means that whatever rights the people had at Common Law were retained by the people despite the ratification of the United States Constitution in 1789. The next step then is both logical and simple. If, at Common Law, a person had the right to write, without being punished, a sexually obscene book, c.f. *Read*, supra, then this right survived the enactment of the United States Constitution and the Amendments thereto. It is elemental that statutes in derogation of Common Law are to be strictly construed. Thus the assumption that "obscenity is not protected," is erroneous and must fall.

2. THE NINTH AMENDMENT RIGHT OF PRIVACY PROTECTS AND PRESERVES THE RIGHT TO RECEIVE, OR VIEW, EVEN HARD CORE PORNOGRAPHY.

The Ninth Amendment, does not, per se, grant "substantive" rights. Rather, this, until recently little understood, Amendment preserves a basic right of man, the right of privacy. While at one time there appeared to be a great disagreement as to precisely what the Ninth Amendment meant, Garvey, *Unenumerated Rights—Substantive Due Process*, the Ninth Amendment, and John Stuart Mill, 1971 Wisc. L. Rev. 992, 928-932, this Court's opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), may well have laid the intellectual and academic debate to rest.

In essence, *Griswold*, supra, held that the right of privacy, "between consenting married adults", is protected against State invasion, by the First Amendment when read with the other Amendments. The "penumbra

of rights" elucidated in *Griswold*, has of course been reaffirmed, most recently by this Court in *Eisenstadt v. Baird*, ____ U.S. ___, 92 S.Ct. 1029 (1972). The question of whether this "right of privacy" is absolute or not is answered simply by the observation that individual liberties ought to be limited only when they are in conflict with the rights of others, *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952); and after all, that is precisely the proposition for which *Redrup v. New York*, *infra*, stands.

Stanley v. Georgia, *supra*, makes it clear that a man's home is the private castle in which he may, for his own personal wishes, enjoy hard core pornography. The "right of privacy" is more than a physical dwelling, however, it is the "privacy of thought," pure or otherwise, provided no one else is harmed. Our democracy functions, in large part, because we enjoy freedom of thought and access to even unpopular ideas. The Ninth Amendment protects this right. This Court must preserve that right and make it meaningful. If *Rich Stanley*, *supra*, has his right of privacy, so must everyman.

3. THE PRIVATE, SEXUAL ACTS AND CONDUCT, OF FOREWARNED ADULTS, ARE PROTECTED UNDER THE FIRST, FIFTH, NINTH AND FOURTEENTH AMENDMENTS.

It is not the function of our laws to impose a moral code; moreover, no immoral conduct, no matter how reprehensible ought to be a basis for a criminal law unless the conduct is harmful to others, or self-destructive. The manner in which an adult conducts his own private affairs in life is his own personal matter. This right to be free

has been articulated by Mr. Justice Brandis in his now famous dissenting opinion in *Olmsted v. United States*, 277 U.S. 438 (1928), quoted with approval in *Stanley v. Georgia*, *supra*:

The makings of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. [Emphasis added.]

This right to be free has of course been expanded considerably since *Griswold*, *supra*, which of course dealt with the right of married adults to receive birth control devices and/or counseling; c.f. *Eisenstadt*, *supra*, which declared unconstitutional a Massachusetts statute which permitted married persons to obtain contraceptives to prevent pregnancy, but prohibited distribution of contraceptives to single persons for the same purposes. This Court in *Eisenstadt*, *supra*, went on to assert that:

If the right of privacy means anything, it is the right of individual, married or single, to be free from unwarranted Governmental intrusion into matters so fundamentally affecting a person as their decision whether to bear or beget a child. See *Stanley v. Georgia*, 394 U.S. 557, 89

S.Ct. 1243, 22 Lawyers Ed.2d 542 (1969). See also *Skinner v. Oklahoma, ex rel., Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 Lawyers Ed. 1655 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 Lawyers Ed. 643 (1905), 92 S.Ct. 1038, [footnotes omitted].

In addition to the problems of birth control decided in *Griswold*, *supra*, and *Eisenstadt*, *supra*, much litigation and legal scholarship have centered on the problems of others and their private sexual conduct. For example with respect to Sodomy, see Hollis, "Criminal Law—Sexual Offenses — Sodomy — Cunnilingus, 8 Natural Resources J. 531(1968); Johnson, Sodomy Statutes — A Need for Change, 13 S.D.L. Review, 384 (1968); Note, Sodomy — Crime or Sin?, 12 University Fla. Law Review, 83 (1959), and also *Cotner v. Henry*, 394 F.2d 873 (1968); Abortion, *United States v. Vuitch*, 402 U.S. 62 (1972), and *State v. Barquet*, 262 So.2d 431 (Fla. 1972), and the cases cited therein, as well as *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969); Homosexual Activities, *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965). All of these cases have one common thread, like *Stanley*, *supra*, the question involved is a moral, not legal one.

Thus the basic question of the function of the law is raised. In the famous English Wolfenden Report of 1957, the authors concluded that:

It is not . . . the function of law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behavior. Wolfenden Report at 9-10.

Moreover, it is the function of the courts, if they are to protect individual liberties from Governmental encroachment to independently evaluate data with reference to the society in which the courts function, c.f. Doss & Doss, "On Moral, Privacy and the Constitution," 25 Univ. Miami Law Review 395, 404 (1971). Thus the Report of the Commission on Obscenity and Pornography and its conclusions with respect to private acts between consenting adults becomes significant when tested by the right of privacy.

Amici contend that the right to buy, sell and commercially distribute and/or exhibit hard core pornography is as protected as the woman's right to choose to bear children, and to freely choose one's own sex partner, provided there is no pandering, intrusion, or juvenile involvement. What man, what justice, what court can tell another man what to read, view, or think about in the privacy of his own thoughts?

4. FEDERAL AND STATE LEGISLATION WHICH SEEK TO PROHIBIT COMMERCIAL DISSEMINATION OF HARD CORE PORNOGRAPHY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Amici contend that obscenity legislation has a discriminatory affect under the Fifth and Fourteenth Amendments to the United States Constitution for which neither the Federal nor various State Governments have a rational basis. It is elementary that the Fifth and Fourteenth Amendments' Equal Protection Clauses prohibit the Fed-

eral and State Governments from enacting legislation which unreasonably and/or arbitrarily discriminates against one identifiable group or individually in favor of another, *Reed v. Reed*, ____ U.S. ____, 92 S.Ct. 251 (1971).

This Court in *Stanley v. Georgia*, *supra*, gave protection to obscene materials found in the sanctity, (and privacy), of the home. The result of this case coupled with obscenity legislation against public exhibition and distribution gave to the rich man who could afford to purchase (even) obscene materials the right to view same in his home while the poor person was precluded entirely from such conduct. The less fortunate could neither afford the initial purchase nor in the case of movies the paraphernalia which are necessary for private exhibition. Thus the poor Stanley, who is denied the right to view this material at a movie theatre, or book store, is by operation of law being discriminated against contrary to the Fifth and Fourteenth Amendments see *U.S. v. Langford*, *supra*, and *U.S. v. Lethe*, *supra*.

This Court has most recently held in *Mayer v. Chicago*, ____ U.S. ____, 92 S.Ct. 410 (1971), that a transcript could not be denied in a criminal case where a fine was imposed merely because the defendant could not afford to pay for the transcript. This Court stressed:

The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. (Emphasis added.)

C.f. Argersinger v. Hamlin, U.S. Supreme Court Case No. 70-5015, ____ U.S. ____, 11 Cr.L. 3089 (June 12, 1972).

A similar situation arose in **Williams v. Illinois**, 399 U.S. 235 (1970), where this Court found an impermissible discrimination, resting on ability to pay, which existed when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary nonpayment of a fine or court cost. See also **Boddie v. Connecticut**, 401 U.S. 371 (1971), Mr. Justice Douglas concurring, where indigents were denied equal protection of the laws in that they could not obtain divorces because of the expenses necessary to gain access to the courts.

Amici would further contend as emphasized above that a fundamental right is involved and thus both the Federal and State Governments must demonstrate an overriding and compelling interest to justify the discrimination. In **Skinner v. Oklahoma**, 316 U.S. 535 (1942), the court found marriage and procreation to be fundamental rights and further that the State showed no compelling State interest to justify sterilization of certain convicted felons and not others.

In **Shapiro v. Thompson**, 394 U.S. 618 (1968), this Court was faced with the constitutionality of waiting periods, i.e., residency requirements, for welfare recipients. This Court held:

Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the state for one year would seem irrational and unconsti-

tutional. But of course the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the strictest standard of whether it promotes a compelling State interest. Under this standard the waiting period requirement clearly violates the Equal Protection Clause.

Neither the Federal nor State Legislatures can show a compelling interest to justify why a poor person is deprived access to the same erotic material a rich man can easily view in the comfort of his own home. A review of *Stanley v. Georgia*, *supra*, and its background makes this proposition the next logical step.

In *Stanley*, the United States Supreme Court specifically held that the First and Fourteenth Amendments protect private possession of obscene press materials. Thus, inherent in the right to possess is the right to receive. Said the Court in *Stanley*:

(3, 4) It is now well established that the Constitution protects the right to receive information and ideas. This freedom (of speech and press) . . . necessarily protects the right to receive . . . *Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943); see *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 307-308, 85 S.Ct. 1493, 1496-1497, 14 L.Ed.2d 898 (1965) (Brennan, J., concurring); *c.f. Pierce v. Society of the Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.

1070 (1925). This right to receive information and ideas, regardless of their socialworth, see *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), is fundamental to our free society, 394 U.S. at 564.

It is interesting to note that in *Stanley* particular reliance is placed upon the opinions in *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, two cases which emphasize the First Amendment right to receive all media of expression. In *Martin*, Mr. Justice Black, speaking for the Court, said:

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they choose to encourage a freedom which they believe essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets . . . Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved, 319 U.S. at 143, 146-147 [emphasis added].

In *Griswold v. Connecticut*, Mr. Justice Douglas, speaking for the Court, said:

... The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read ... and freedom to teach ... indeed the freedom of the entire university community ... without those peripheral rights the specific rights would be less secure, 381 U.S. 482, 483, [emphasis added].

In *Lamont v. Postmaster General*, quoting Justice Brennan's concurring opinion, 381 U.S. 301, 308 (1965) (which was cited in *Stanley*):

The right to receive publications ... is a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers.

The entire opinion and reasoning of the Supreme Court in *Stanley* take on the broader dimension of "mere private possession." It is true that the facts of *Stanley* involve a seizure of obscene materials from Stanley's bedroom but the language of the opinion clearly suggests that States have no business under the First and Fourteenth Amendments of the United States Constitution to

attempt to regulate the moral contents of a person's thoughts. This Court unequivocally held:

Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. . . . The State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. . . . Finally we are faced with the argument that the prohibition of possession of obscenity is a necessary incident to statutory schemes prohibiting distribution we are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. . . . We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home, 394 U.S. at 566-568 (emphasis added).

Clearly, by its reliance upon cases involving distribution and receiving of expression, **Martin, Griswold, Lamont**, and others, **Stanley** also stands for the proposition that inherent in the right to possess is also the right to receive.

Several lower courts have already expressed the view *Amici press instanter*, for example, in *United States v. Lethe*, *supra*, that court held, "that a person has a constitutional right to buy or receive obscene material." 312 F.Supp. at 424. The court went on to state that:

The final step is not difficult. Can it be reasonably argued that although the government may not directly prevent someone from buying a book, it may achieve the same result indirectly by making it a crime to sell the book to him? I think not, unless the Government can demonstrate it has some substantial interest in preventing the sale other than keeping the purchaser from buying, 312 F.Supp. at 424.

Similarly *United States v. Langford*, *supra*, held that in the absence of *Redrup v. New York*, 386 U.S. 767 (1967) proscriptions, that even though materials are hard core pornography, "accepting the major premise in *Stanley v. Georgia* as the law, the logic of the *Lethe* case and the result it reaches seem unassailable," 315 F.Supp. at 194.

The Second Circuit Court of Appeals likewise has come to a similar conclusion in *United States v. Dellatia*, 433 F.2d 1252 (2d Cir. 1970). There appellant's conviction for a violation of 18 USC, Section 1461 was reversed based in large part on *Stanley v. Georgia*, *supra*, and the additional fact that the Government had failed to show a compelling interest, i.e., *Redrup* type conduct. Similarly the United States Court of Appeals for the District of Columbia has held in *Williams v. District of Columbia*, 419 F.2d 638 (CADC 1969), that:

"... That the State has no 'right to protect the individual's mind from the effects of obscenity' simply because it wishes 'to control the moral conduct and content of a person's thoughts.' This, the court said, would be inconsistent with the 'philosophy of the First Amendment,'" 419 F.2d at 645.

It would serve no useful purpose to supply additional cases of either Federal or State courts in which great reliance was placed on *Stanley v. Georgia*, supra. From the time *Stanley v. Georgia*, supra, was decided until this Court rendered its opinions on May 3, 1971, in both *United States v. Reidel*, 402 U.S. 351 (1971), and *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), the natural assumption by legal scholars and judicial officers as well as exhibitors and disseminators of allegedly obscene material, was that the logical extension of *Stanley* would permit consenting adults in nonobtrusive circumstances to purchase and/or exhibit even hard core pornography. This Court, of course, foreclosed, apparently, this logical extension in holding that the use of the United States mails to distribute admittedly obscene materials was conduct which would be punished by appropriate criminal process, (*Reidel*); and further that the Tariff Act of 1930, Section 305(a), 19 USC, Section 1305(a) and related sections, were constitutional and did permit the seizure upon reentry into the United States' borders of admittedly obscene material, even though these materials were intended solely for private use, (*37 Photographs*). Amici contend of course that the issue of the right of the Federal Government to prohibit of in commerce in obscene material is separate and apart from the underlying philosophy and scope of *Stanley v. Georgia*. It seems clear

that in retrospect that both *Reidel*, supra, and *Thirty-Seven Photographs*, supra, fly in the face of *Stanley v. Georgia*, and the latter is far more consistent with both the historical and modern concept of the First Amendment, especially when tested by the Fifth and Fourteenth Amendments.

For this Court to hold otherwise would be to give to the citizens and residents of the United States an empty right under *Stanley v. Georgia*, supra. For, the right to receive in the privacy of one's own home, even hard core pornography, is meaningless unless one also has the collateral right to purchase such material. Obviously someone must have the right to sell or exhibit this material in order for *Stanley*, supra, to be available to the poor man as well as the rich.

D. IN THE ABSENCE OF EMPIRICAL DATA SUPPORTING THE ASSUMPTION THAT OBSCENE MATERIAL IS HARMFUL, THERE IS NO RATIONAL BASIS TO MAKE CRIMINAL THE BUYING, SELLING, RECEIVING, PUBLISHING, DISTRIBUTING, OR EXHIBITING OF SEXUALLY EROTIC MATERIALS TO ADULTS FOREWARNED OF ITS NATURE.

Law in any field, to be adequate and sound must rest on facts. It must grow out of experience. Thus research designed to make systematic investigations into human experience becomes indispensable to the healthy growth of the law. Erwin N. Griswald, Dean, Harvard Law School; Foreward in *Unraveling Juvenile Delinquency*, by Glueck, 1950.

The United States Congress found traffic in obscenity and pornography to be of national interest and further found that the Federal Government had a responsibility to investigate the gravity of the situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the dissemination of such material. The Commission on Obscenity and Pornography was established by Public Law 90-100 (1967).

Ironically,

Before the findings of the commission were actually published, it was revealed that this body had drafted a report which was in direct contravention to what its sponsors believed such a commission would urge. **Censorship: For and Against**, Hart, pp. 7 (1971).

In, **The Report of the Commission on Obscenity and Pornography**, hereafter referred to as the **Report**, the Commission set forth the results of its study, and its various conclusions and recommendations, all of which were derived from the extensive socio-scientific study undertaken.

The focal point of the Commission's decision was that no social justification exists for the retention or enactment of broad legislation prohibiting the consensual distribution of sexual materials to adults and that the primary area of public concern was the thrusting of offensive materials upon unwilling recipients and the fear that these materials might be distributed to minors. The

Commission concluded that these two areas could be regulated effectively by legislative prohibitions, **Report at 42-43.**

The Commission's conclusion was based on several considerations, First:

Extensive empirical investigations, both by the Commission and by others, provides no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms, such as crime, delinquency, sexual or non-sexual deviancy or severe emotional disturbances. **Report at 52 (and 56).**

One study for example showed that eighty (80) percent of the social-psychiatric clinicians consulted reported that they never encountered a case in which "pornography" appeared to be a factor in producing anti-social sexual behavior. The study also found that eighty-four (84) percent of the psychiatrists and psychologists disagreed with the statement "persons exposed to pornography are more likely to engage in antisocial sexual acts than person's not exposed," **Report at 161.** The Commission in fact added that analysis of the United States Crime rates do not support the thesis of a causal connection between the availability of erotica and sex crimes among either juveniles or adults and that studies showed that adult sex offenders are not significantly different from other adults in exposure or in reported arousal or reported likelihood of engaging in sociosexual behavior following exposure to erotica, **Report at 242.**

It should further be noted that the limited amount of information concerning the effects of sexually explicit materials on children was a factor which led the Commission however to be restrictive in the area of minors.

A second consideration upon which the Commission reached its conclusion was that public opinion in America did not support the imposition of legal prohibitions on the right of adults to read or see explicit sexual materials. The majority of the American people presently are of the view that adults should be legally able to read or see explicit sexual materials if they wish to do so, **Report at 43, 53.**

Further findings were the fact that studies showed that explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults, society's attempts to legislate for adults in the area of obscenity have not been successful and are extremely unsatisfactory in their practical application; and the fact that expenditures of considerable law enforcement resources are involved where there appears no justification to support these expenditures, **Report at 52-53.**

Finally and of great importance to the Commission was:

The spirit and letter of our constitution tell us that government should not seek to interfere with these rights (press and speech) unless a clear threat of harm makes that course imperative. Moreover, the possibility of the misuse of

general obscenity statutes prohibiting distribution of books and films to adults constitute a continuing threat to the communication of ideas among Americans — one of the most important foundations of our liberties, **Report** at 54.

The Legal Panel of the Commission did an in depth and extremely comprehensive report of the legal history of obscenity decisions, **Report** at 293-369.

Of utmost importance is the Commission discussion of **Roth v. United States**, 354 U.S. 476 (1957), and subsequent cases. The Commission found that the **Roth**, *supra*, case held that prohibition upon the distribution of obscene material to consenting adults to be constituted without reliance upon authoritative findings or conclusions regarding the social effects of such material, **Report** at 357.

The Commission went on to say to 358:

Developments since the **Roth** decision have suggested both practical and constitutional doubts about appropriateness of its conclusion that distribution of "obscene" materials to consenting adults may constitutionally be broadly prohibited without reference to considerations of social harm. These developments have been in three areas: (a) The enormous practical difficulties under **Roth** of meaningfully defining what is "obscene" for consenting adults and of fairly applying such definitions in legal proceedings; (b) changing public opinion regarding the need for and the wisdom of prohibiting distribution

of sexual materials to consenting adults; (c) Developing constitutional doctrine holding that free expression guarantees apply to "obscene" materials in at least some adult contexts.

The Commission went on to discuss all of the above points and put special emphasis on the Constitutional issues stating; at 358-359:

The fundamental premise of **Roth** — that protections accorded to speech by the Constitution are wholly inapplicable to "obscene" material — was apparently rejected by the Supreme Court in 1969 in **Stanley v. Georgia**. There the court indicated that, even where material is "obscene", the individual citizen nevertheless has a constitutionally protected right, if he so wishes, to read or view such material at least in his own home. Obscenity prohibitions which interfere with this right appear to require the support of a sufficient governmental interest. The protection of juveniles from exposure to obscene materials and the protection of individual sensibilities against materials involuntary thrust upon persons who do not wish to see them were recognized in **Stanley** as legitimate governmental concerns. On the other hand, **Stanley** appears to have held that government may not rest prohibitions upon what consenting adults may read or view upon a desire to control their morality, or upon a desire to prevent crime or antisocial behavior, at least, in the absence of a solid empirical foundation. [Emphasis added.]

The areas where a rational basis for legislation prohibiting explicit sexual materials exists was stated in **Redrup v. New York**, 386 U.S. 767 (1967). These include situations where minors are involved, or where materials are thrust upon persons who do not wish to see them, or where pandering to non-consenting adults or juveniles has taken place. In fact it is these situations which the Commission felt should be regulated, **Report at 56-62.**

It is beyond question that both the State and Federal Governments must have a rational basis for enacting legislation, **Williams v. Lee Optical**, 348 U.S. 483 (1955); c.f. **Leary v. U. S.**, supra. No rational basis exists for having obscenity prohibition legislation where consenting adults are involved. This was clearly shown by the **Report**. The circumstances in **Buck v. Bell**, 274 U.S. 200 (1927), should be informative to this court in deciding the Constitutional issues involved instanter. In **Bell**, a Virginia statute allowed sterilization of feeble minded persons after very strict procedures were followed. This court found a rational basis for the statute as there was scientific evidence that such disease is hereditary. Instanter, no evidence can be adduced to show a rational basis for obscenity statutes relating to consenting adults as none exists. Thus, such legislation is truly in violation of the Fifth and Fourteenth Amendments.


To permit the First Amendment to be eroded without constitutional basis because of some unpopular sentiment toward the expression involved will result in the creation of numerous additional exceptions to that Amendment which will lead to the eventual destruction of this most important and time honored right.

CONCLUSION

Amici respectfully submit that this Court must hold that the First Amendment absolutely protects the right of a previously forewarned adult to buy, sell, receive, write, publish, distribute, disseminate and/or exhibit even hard core pornography and obscene material provided there is no assault or intrusion upon the sensibilities of other non-interested adults, no pandering, and no juvenile involvement. The Constitution of the United States, and the First Amendment thereto, stands as a bar against any limitation upon the right of adults to read or view sexually explicit material. The State and the Federal Governments' concern is properly limited to the dissemination of such material only where there is an assault or intrusion upon the sensibilities of other non-interested adults, pandering, or juvenile involvement.

Respectfully submitted,

JOEL HIRSCHHORN,
RALPH J. SCHWARZ, JR.,
MEL S. FRIEDMAN,
Amici Curiae.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 1972, copies of the above and foregoing were mailed, postage prepaid, to all attorneys of record; I FURTHER CERTIFY that all copies required to be served herein have been served.

JOEL HIRSCHHORN,
Amicus Curiae

Commonwealth of Kentucky
Office of the Attorney General
Frankfort
August 1, 1972

The Honorable Joel Hirschhorn
Attorney at Law
1040 City National Bank Building
Miami, Florida 33130

Re: Roaden v. Commonwealth of Kentucky
U.S. Supreme Court Case No. 71-1134

Dear Mr. Hirschhorn:

In response to your letter of July 28, 1972, requesting our consent to your desire to write a brief as Amicus Curiae in the above-styled case, we do not consent to your intervention, since the issue which you suggest that you will brief is, in our opinion, outside of the scope of the question presented by the Supreme Court.

As you probably know, that question is: "In the absence of a prior adversary hearing, is the seizure, incident to an arrest, of allegedly obscene material a violation of due process of law?"

Thank you for writing the Attorney General.

Sincerely,

ED W. HANCOCK
ATTORNEY GENERAL

/s/Robert V. Bullock

By: Robert V. Bullock

Assistant Attorney General

RVB/sd

App. 2

HARRIS AND WICKER

Attorneys at Law

120 North Main Street

Somerset, Kentucky 42501

July 31, 1972

Hon. Joel Hirschhorn

Attorney at Law

1040 City National Bank Building

Miami, Florida 33130

Re: Roaden vs. Commonwealth of Kentucky

U. S. Supreme Court Case No. 71-1184

Dear Mr. Hirschhorn:

I have your letter of July 27, 1972, in which you request our consent to your filing an Amicus Curiae Brief in the above case.

Before we consent to the filing of such Brief, I would like to know just what position you would take in such Brief. Would it be favorable to our client, Harry Roaden, or would it be favorable to the prosecution? Your letter advises the issues on which you intend to touch, and I have the impression that such Brief would be favorable to the position of our client. However, we have already refused to consent to the so-called Citizens for Decent Literature filing such a Brief, and we do not intend to consent to anyone filing a Brief Amicus Curiae contrary to the best interests of Harry Roaden.

App. 3

Our Brief in the Supreme Court has already been filed in this case and was filed May 30, 1972. However, the Commonwealth of Kentucky has received an extension of time to file its Brief until August 14, 1972.

Sincerely yours,

/s/Phillip K. Wicker
PHILLIP K. WICKER

PKW/pp

in the
Supreme Court
of the
United States

OCTOBER TERM, 1971

No. 71-1134

HARRY ROADEN,

Petitioner,

vs.

STATE OF KENTUCKY,

Respondent.

On Writ of Certiorari to
The Supreme Court of Kentucky

Motion for Leave to File Untimely Amicus Curiae Brief
and to Participate in the Oral Argument by
Joel Hirschhorn, Esq., as Amicus Curiae
in Support of Petitioner.

JOEL HIRSCHHORN,
25 West Flagler Street
Suite 1040
Miami, Florida
(305) 358-5320

RALPH J. SCHWARZ, JR.
22 East 40th Street
New York City, New York
(212) 696-8160

MEL S. FRIEDMAN
723 Main Street, Suite 410
Houston, Texas
(713) 228-0491

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in Support of Petitioner.

Joel Hirschhorn, Ralph J. Schwarz, Jr., and Mel S.
Friedman, Esqs., amicus Curiae on behalf of Petitioner
respectfully move that leave be granted to Joel Hirsch-

horn to participate in the oral argument as *amicus curiae* in support of Petitioner. A brief *amici curiae* by the said Joel Hirschhorn, Ralph J. Schwarz, Jr., and Mel S. Friedman, Esqs., on behalf of Petitioner, has heretofore been filed with the court with the consent of the Petitioner.

1. The interest of amici in this case arises from the fact that they are counsel in a profusion of cases, in Federal and State courts throughout the United States involving the same constitutional issue before the court in this case, namely, whether it is constitutionally permissible for a State to punish the dissemination of allegedly obscene material to adults, in the light of the free speech and press, due process and equal protection provisions of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

2. The First Amendment Lawyers' Association is an informal organization comprised of approximately seventy-five attorneys who participate extensively in First Amendment litigation involving literally thousands of cases throughout the United States in both State and Federal courts.

3. Amici believe that oral argument will provide assistance to the court, not otherwise available. The formulation of standards and criteria, relative to the dissemination of material dealing with sex and nudity to adults, by the court, involves considerations reaching beyond the particular concrete situation presented in the case herein. There is need for the court to know, it is submitted, the operation and effect of obscenity statutes

and their impact upon the exercise of freedoms of speech and press by the adult community throughout the United States. Oral argument would offer the opportunity to present to the court essential facts, important data, and empirical evidence, as well as a summary of diversified experiences which bear importantly upon the substantial constitutional question presented to the court. The argument would inform the court with respect to the chilling effect of obscenity statutes upon the circulation of constitutionally protected material to adults. There is also probative data available that obscenity statutes for adults necessarily lend themselves to arbitrary, discriminatory and selective enforcement. The information and evidence which amicus is prepared to furnish the court on oral argument will, it is submitted, be fruitful, illuminating and helpful to the court in determining the substantial constitutional issue presented in the case.

4. The instant brief of amici curiae is not timely due to the following facts:

a. The decision to write a brief as amici curiae was made after the respective due date of counsel of records' brief;

b. Due to the press of numerous other trial and appellate matters the undersigned amici were unable to complete this brief timely;

c. This brief and motion is filed in good faith and with the intention of aiding this court in resolving the urgent and vital issues presented to the court.

WHEREFORE, amici respectfully pray that the Motion for Leave to File Untimely Brief as amicus curiae be granted, and the Motion for Leave to Participate in the Oral Argument by Joel Hirschhorn, as amicus curiae, likewise be granted, and that the court allot such time for oral argument as may seem proper.

DATED: October 2, 1972.

Respectfully submitted,

Joel Hirschhorn, Amicus Curiae
Ralph J. Schwarz, Jr., Amicus Curiae
Mel S. Friedman, Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 1972, copies of the above and foregoing were mailed, postage prepaid, to all attorneys of record; I FURTHER CERTIFY that all copies required to be served herein have been served.

JOEL HIRSCHHORN, Amicus Curiae

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROADEN v. KENTUCKY

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 71-1134. Argued November 14, 1972—Decided June 25, 1973

A county sheriff viewed a sexually explicit film at a local drive-in theater. At the conclusion of the showing, he arrested petitioner, the theater manager, for exhibiting an obscene film in violation of Kentucky law, and seized, without a warrant, one copy of the film for use as evidence. There was no prior judicial determination of obscenity. Petitioner's motion to suppress the film as evidence on the ground of illegal seizure was denied, and he was convicted. The Kentucky Court of Appeals affirmed, holding that the concededly obscene film was properly seized incident to a lawful arrest. *Held*: The seizure by the sheriff, without the authority of a constitutionally sufficient warrant, was unreasonable under Fourth and Fourteenth Amendment standards. The seizure is not unreasonable simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle of reasonableness. *Lee Art Theatre v. Virginia*, 392 U. S. 636; *Marcus v. Search Warrant*, 367 U. S. 717. This case does not present an exigent circumstance in which police action must be "now or never" to preserve the evidence of the crime, and where it may be reasonable to permit action without prior judicial approval. Pp. 5-10.

473 S. W. 2d 814, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion in which STEWART and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1134

Harry Roaden, Petitioner, | On Writ of Certiorari to
v. | the Court of Appeals of
Commonwealth of Kentucky. | Kentucky.

[June 25, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether the seizure of allegedly obscene material, contemporaneous with and as an incident to an arrest for the public exhibition of such material in a commercial theatre, may be accomplished without a warrant.

On September 29, 1970, the sheriff of Pulaski County, Kentucky, accompanied by the district prosecutor, purchased tickets to a local drive-in theater. There the sheriff observed, in its entirety, a film called "Cindy and Donna" and concluded that it was obscene and that its exhibition was in violation of state statute. A substantial part of the film was also observed by a deputy sheriff from a vantage point on the road outside the theater. Since the petitioner conceded the obscenity of the film at trial, that issue is not before us for decision.¹

The sheriff, at the conclusion of the film, proceeded to the projection booth, where he arrested petitioner, the

¹ Petitioner's lawyer made the following statement to the trial jury during the closing arguments:

"I would be good enough to tell you at the outset that, in behalf of Mr. Roaden, I am not going to get up here and defend the film observed yesterday nor the revolting scenes in it or try to argue or persuade you that those scene[s] were not obscene."

manager of the theater, on the charge of exhibiting an obscene film to the public contrary to 436 Ky. Rev. Stat. § 101.² Concurrent with the arrest, the sheriff seized

² Kentucky Revised Statutes, c. 436, § 101, reads in relevant part as follows:

"436.101 Obscene matter, distribution, penalties, destruction.

"(1) As used in this section:

"(a) 'Distribute' means to transfer possession of, whether with or without consideration.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters.

"(d) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(2) Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than \$1,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense not to exceed ten thousand dollars, or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this subsection, he is punishable by fine of not more than \$2,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed \$25,000, or by imprisonment in the county

one copy of the film for use as evidence. It is uncontested: (a) that the sheriff had no warrant when he made the arrest and seizure, (b) that there had been no prior determination by a judicial officer on the question of obscenity, and (c) that the arrest was based solely on the sheriff's observing the exhibition of the film.

On September 30, 1970, the day following the arrest of petitioner and the seizure of the film, the Grand Jury of Pulaski County heard testimony concerning the scenes and content of the film and returned an indictment charging petitioner with exhibiting an obscene film in violation of 436 Ky. Rev. Stat. § 101. On October 3, 1970, petitioner entered a plea of not guilty in the Pulaski Circuit Court, and the case was set for trial. On October 12, 1970, petitioner filed a motion to suppress the film as evidence and to dismiss the indictment. The motion was predicated upon the ground that the film was "improperly, unlawfully and illegally seized, contrary to . . .

jail for not more than one year, or by both such fine and such imprisonment. If a person has been twice convicted of a violation of this section, a violation of this subsection is punishable by imprisonment in the state penitentiary not exceeding five years.

"(8) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: 'We find the . . . (title or description of matter) to be obscene,' or 'We find the . . . (title or description of matter) not to be obscene,' as they may find each item is or is not obscene.

"(9) Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the Attorney General, Commonwealth's attorney, county attorney, city attorney, or their authorized assistants, or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control."

the laws of the land." Four days later, on October 16, 1970, the Pulaski Circuit Court heard argument at an adversary hearing on petitioner's motion. The motion was denied.

Petitioner's trial began on October 20, 1970. The arresting sheriff and one of his deputies were the only witnesses for the prosecution. The sheriff testified that the film displayed nudity and "intimate love scenes." The sheriff further testified that, upon viewing the film, he determined that it was obscene and that its exhibition violated state law. He therefore arrested petitioner. Together with the testimony of the sheriff, the film itself was introduced in evidence. Petitioner's motion to suppress the film was renewed, and again overruled. The sheriff's deputy took the stand and testified that he had viewed the final 30 minutes of the film from a vantage point on a public road outside the theater. Following this testimony, the jury was permitted to see the film.

Petitioner testified in his own behalf. He stated that, to his knowledge, no juveniles had been admitted to see the film, and that he had received no complaints about the film until it was seized by the sheriff. At the close of his testimony, the jury found petitioner guilty as charged. The jury rendered both a general verdict of guilty and a special verdict that the film was obscene, as provided by 436 Ky. Rev. Stat. § 101 (8), *supra*.

On appeal, the Court of Appeals of Kentucky affirmed petitioner's conviction. The Court of Appeals first emphasized that "[i]t was conceded by [petitioner's] . . . counsel in closing argument to the jury that the film is obscene. No issue is presented on appeal as to the obscenity of the material." 473 S. W. 2d 814, 815 (1971). The Court of Appeals then held that the films were properly seized incident to a lawful arrest, distinguishing the holdings of this Court in *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964), and *Marcus*

v. *Search Warrant*, 367 U. S. 717 (1961), on the ground that those decisions related to seizure of allegedly obscene materials "for destruction or suppression, not to seizures incident to an arrest for possessing, selling, or exhibiting a specific item." 473 S. W. 2d, at 815. It also distinguished *Lee Art Theatre v. Virginia*, 392 U. S. 636 (1968), on the grounds that, in that case, film "had been seized pursuant to a [defective] search warrant, not incident to an arrest." 473 S. W. 2d, at 816. The Court of Appeals relied on a decision of a federal three-judge court in *Hosey v. City of Jackson*, 309 F. Supp. 527 (SD Miss.) (1970), which concluded that:

"[S]eizure of an allegedly obscene film as an incident to lawful arrests for a crime committed in the presence of the arresting officers, i. e., the public showing of such film, does not exceed constitutional bounds in the absence of a prior judicial hearing on the question of its obscenity." *Id.*, 309 F. Supp., at 533 (1970).

The Court of Appeals specifically declined to follow a decision by another federal three-judge court in *Ledesma v. Perez*, 304 F. Supp. 662 (ED La.) (1969), which held unconstitutional the seizure of allegedly obscene material incident to an arrest without a warrant or a prior adversary hearing.³

I

The Fourth Amendment proscription against "unreasonable . . . seizures," applicable to the States through the Fourteenth Amendment, must not be read in a

³ We vacated the judgment in *Hosey v. City of Jackson*, *supra*, on the grounds of the Court's policy of noninterference in state prosecution; we did not reach the merits. *Hosey v. City of Jackson*, 401 U. S. 987 (1971). We also vacated the judgment in *Ledesma v. Perez*, *supra*, again on the grounds of noninterference with state criminal proceedings prior to adjudications by state courts. *Perez v. Ledesma*, 401 U. S. 82 (1971).

vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. Cf. *Coolidge v. New Hampshire*, 403 U. S. 443, 471-472 (1971); *id.*, 403 U. S., at 509-510 (Black, J., concurring and dissenting); *Id.*, 403 U. S., at 512-513 (WHITE, J., concurring and dissenting). The question to be resolved is whether the seizure of the film without a warrant was unreasonable under Fourth Amendment standards and, if so, whether the film was therefore inadmissible at the trial. The seizure of instruments of a crime, such as a pistol or a knife, or "contraband or stolen goods or objects dangerous in themselves," *id.*, 403 U. S., at 472, are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards.

Marcus v. Search Warrant, *supra*, held that a warrant for the seizure of allegedly obscene books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene. Such a warrant lacked the safeguards demanded "to assure nonobscene material the constitutional protection to which it is entitled [T]he warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." *Id.*, 367 U. S., at 731-732. There had been "no step in the procedure before seizure designed to focus searchingly on the question of obscenity." *Id.*, 367 U. S., at 732.

The sense of this holding was reaffirmed in *A Quantity of Copies of Books v. Kansas*, *supra*, where the Court found unconstitutional a "massive seizure" of books from a commercial book store for the purpose of destroying the books as contraband. The result was premised on the

lack of an adversary hearing prior to seizure, and the Court did not find it necessary to reach the claim that the seizure violated Fourth Amendment standards. *Id.*, 378 U. S., at 210, n. 2 (1963). However, the Court emphasized:

"It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected the proposition in *Marcus*." *Id.*, 378 U. S., at 211-212 (1963).

Lee Art Theatre v. Virginia, *supra*, was to the same effect with regard to seizure of a film from a commercial theatre regularly open to the public. There a warrant for the seizure of the film was issued on the basis of a police officer's affidavit giving the titles of the film and asserting in conclusory fashion that he had personally viewed the films and considered them obscene. The films were seized pursuant to the warrant and introduced into evidence in a criminal case against the exhibitor. Conviction ensued. On review the Court held that "[t]he admission of the films in evidence requires reversal of petitioner's conviction" because:

"... The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' *id.*, [*Marcus v. Search Warrant*, *supra*] at 732, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." *Lee Art Theatre v. Virginia*, *supra*, 392 U. S., at 637 (1968).

No mention was made in the brief *per curiam* *Lee Art Theatre* opinion as to whether or not the seizure was incident to an arrest. The Court relied on *Marcus* and *Quantity of Books*.

The common thread of *Marcus*, *Quantity of Books*, and *Lee Art Theatre* is to be found in the nature of the materials seized and the setting in which they were taken. See *Stanford v. Texas*, 379 U. S. 476, 486 (1965).⁴ In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film, then being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.⁵ As we stated in *Stanford v. Texas*, *supra*:

"In short, . . . the constitutional requirement

⁴ In *Stanford v. Texas*, *supra*, 379 U. S., at 486 (1965), we acknowledged the difference between books and weapons, narcotics, or cases of whiskey.

⁵ This does not mean an adversary proceeding is needed before seizure, since a warrant may be issued *ex parte*. *Heller v. New York*, — U. S. — (1973).

that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See *Marcus v. Search Warrant*, 367 U. S. 717; *A Quantity of Books v. Kansas*, 378 U. S. 205. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." 379 U. S., at 485 [footnotes omitted].

Moreover, ordinary human experience should teach that the seizure of a movie film from a commercial theatre with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated. In the latter settings, the probable cause for an arrest might justify the seizure of weapons, or other evidence or instruments of crime, without a warrant. Cf. *Chimel v. California*, 395 U. S. 752, 764 (1969); *Id.*, 395 U. S., at 773-774 (WHITE, J., dissenting); *Preston v. United States*, 376 U. S. 364, 367 (1964). Where there are exigent circumstances in which police action literally must be "now or never" to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.* See *Chambers v. Maroney*, 399 U. S. 42, 47-51 (1970). Cf.

* Counsel for Kentucky, together with counsel for New York in *Heller v. New York*, *supra*, — U. S., at — (p. 10) (1973), and counsel for California, *amicus curiae* in *Heller*, have emphasized that allegedly obscene films are particularly difficult evidence to preserve unless kept in custody. We again take judicial notice that films may be compact, may be easy to destroy or to remove to another jurisdic-

Carroll v. United States, 267 U. S. 132 (1925). The facts surrounding the "massive seizures" of books in *Marcus and Quantity of Books*, or the seizure of the film in *Lee Art Theatre*, presented no such "now or never" circumstances.

II

The film seized in this case was being exhibited at a commercial theatre showing regularly scheduled performances to the general public. The seizure proceeded solely on a police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to "focus searchingly on the question of obscenity." See *Heller v. New York*, — U. S. — (p. 5) (1973); *Marcus v. Search Warrant*, *supra*, 367 U. S., at 732 (1961). If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, *a fortiori*, the officer may not make such a seizure with no warrant at all. "The use by the government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. . . . The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant*, *supra*, 367 U. S., at 724, 729 (1961). In this case, as in *Lee Art Theatre*, the admission of the film in

tion, and may be subject to pretrial alterations by cutting out scenes and resplicing reels. See *Heller v. New York*, *supra*, — U. S. — (p. 10) (1973). But, as the *Heller* case demonstrates, where films are scheduled for exhibition in a commercial theater open to the public, procuring a warrant based on a prior judicial determination of probable cause of obscenity need not risk loss of the evidence.

evidence requires reversal of petitioner's conviction. *Lee Art Theatre v. Virginia*, 392 U. S., at 637 (1968).

The judgment of the Court of Appeals of Kentucky is reversed and this case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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SUPREME COURT OF THE UNITED STATES

No. 71-1134

Harry Roaden, Petitioner,	} On Writ of Certiorari to	
v.		the Court of Appeals of
Commonwealth of Kentucky.		Kentucky.

[June 25, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in reversal.

We granted certiorari to consider the holding of the Court of Appeals of Kentucky that the Constitution does not require an adversary hearing on obscenity prior to the seizure of reels of film, where the seizure is incident to the arrest of the manager of a drive-in movie theatre. 473 S. W. 2d (1971). The statute under which the prosecution was brought* is, in my view, unconstitutionally overbroad and therefore invalid on its face. See my dissent in *Paris Adult Theatre v. Slaton*, — U. S. — (1973). I would therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings not inconsistent with my dissenting opinion in *Slaton*.

*Ky. Rev. Stat. § 436.101 (2) provides in part that

"Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than \$1,000 . . . or by imprisonment in the county jail for not more than six months"